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# THE IMPACT AND EVOLUTION OF THE MASSACHUSETTS COMPREHENSIVE PERMIT AND ZONING APPEALS ACT: THIRTY YEARS OF EXPERIENCE WITH A STATE LEGISLATIVE EFFORT TO OVERCOME EXCLUSIONARY ZONING

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# THE IMPACT AND EVOLUTION OF THE MASSACHUSETTS COMPREHENSIVE PERMIT AND ZONING APPEALS ACT: THIRTY YEARS OF EXPERIENCE WITH A STATE LEGISLATIVE EFFORT TO OVERCOME EXCLUSIONARY ZONING

SHARON PERLMAN KREFETZ\*

## INTRODUCTION

The Massachusetts, New Jersey, Connecticut, and Rhode Island statutes<sup>1</sup> that provide for a state override of local zoning decisions are extraordinary in many respects.<sup>2</sup> The Massachusetts

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1. See CONN. GEN. STAT. § 8-30g to -30h (1999); MASS. GEN. LAWS ch. 40B, §§ 20-23 (1998); N.J. STAT. ANN. § 52:27D-301 to -329 (West 1986 & Supp. 2000); R.I. GEN. LAWS § 45-53-1 to -8 (1999).

2. See Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Lim-*

statute was initially referred to as the “Anti-Snob Zoning Law”<sup>3</sup> or chapter 774 (prior to enactment). It has subsequently become known as the Comprehensive Permit and Zoning Appeals Act (“Act”) or chapter 40B for its location in the Massachusetts General Laws.<sup>4</sup> Chapter 40B is especially notable for several reasons. These include the timing of its initiation, the political context for its passage, its role as a model for similar legislation in other states, and its impact and evolution over the three decades since it was enacted. The focus of this Article is on the law’s impact and evolution. However, a brief consideration of the other reasons that make it noteworthy is in order.

Chapter 40B was promulgated in 1969, a few years before the term “opening up the suburbs” entered scholarly and policy lexicons,<sup>5</sup> and several years before the landmark New Jersey *Mount Laurel* decisions<sup>6</sup> came along. The enactment of chapter 40B occurred well before New Jersey’s Fair Housing Act was passed<sup>7</sup> and more than two decades before the President’s Commission on Regulatory Barriers to Affordable Housing arrived at the “disturbing conclusion” that “exclusionary, discriminatory, and unnecessary

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*ited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. (forthcoming 2001).

3. It was chapter 774 of the Mass. Acts and Resolves. “Snob zoning” is another name for exclusionary zoning, which is what the Act’s backers took aim at overcoming. The statute’s two most significant features are the “one-stop” application and approval process and the authorization of a state override of local zoning decisions; its location in the Massachusetts General Laws is chapter 40B, sections 20 through 23. Throughout this Article, I will refer to the statute as chapter 40B.

4. Ch. 40B, §§ 20-23. The official title of the Act is “Low and Moderate Income Housing.” *Id.* § 20.

5. The term seems to have first appeared in the early 1970s. See Paul Davidoff & Linda Davidoff, *Opening Up the Suburbs: Toward Inclusionary Land-Use Controls*, 22 SYRACUSE L. REV. 525 (1971); see also MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 199-242 (1976) (providing an overview of early efforts to open up the suburbs); ANTHONY DOWNS, *OPENING UP THE SUBURBS* (1973). Scholarly works on exclusionary zoning had, however, been published before chapter 40B was proposed. See, e.g., RICHARD F. BABCOCK, *THE ZONING GAME* (1966). One review of the literature on exclusionary zoning found that by 1974 over 250 books and articles had been published on the topic. 2 KENNETH H. YOUNG, *ANDERSON’S AMERICAN LAW OF ZONING*, § 8.01, at 5 (4th ed. 1996).

6. See also *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*]; *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*].

7. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 2000) (enacted July 2, 1985); see John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. (forthcoming 2001) (discussing the *Mount Laurel* decisions and the Fair Housing Act).

regulations constitute formidable barriers to affordable housing.”<sup>8</sup> Indeed, the Massachusetts statute was based on a remarkably early recognition by its proponents that exclusionary zoning practices, such as large minimum lot size requirements and bans on multi-family housing, play a significant role in driving up housing costs and causing the dominant spatial pattern of economic and racial segregation found in most metropolitan areas of the United States.<sup>9</sup>

Chapter 40B was initiated and passed in Massachusetts without any significant court rulings dealing with exclusionary zoning, or any judicial instigation, unlike New Jersey’s Fair Housing Act.<sup>10</sup> The absence of judicial pressure and the presence of sizeable suburban representation in the legislature made it all the more remarkable that the Massachusetts legislature, in 1969, reasserted the state’s authority to act for the general welfare in the area of land use control—an area that is “[o]f all the powers held by the local sovereign . . . deemed most sacred by its citizens.”<sup>11</sup> Moreover, in New England there is an especially long-standing, strong tradition of localism.<sup>12</sup> In fact, the passage of the Comprehensive Permit and Zoning Appeals Act in Massachusetts contradicts a conclusion drawn in several analyses of the history of the New Jersey Fair Housing Act, to wit, that state legislatures will only tackle the problem of exclusionary zoning and address the need to get affordable

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8. ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., “NOT IN MY BACK YARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING (1991). These findings were noted in the report’s cover letter by HUD Secretary Jack Kemp dated July 8, 1991. *Id.* However, influential government reports documenting urban problems, growing segregation in metropolitan areas, and the critical lack of affordable housing had been published before chapter 40B was enacted. *See* NAT’L COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1969); REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS (1968); THE PRESIDENT’S COMM. ON URBAN HOUS., A DECENT HOME (Aug. 1, 1969).

9. *See* R.J. JOHNSTON, RESIDENTIAL SEGREGATION, THE STATE AND CONSTITUTIONAL CONFLICT IN AMERICAN URBAN AREAS 30-35 (1984) (noting the part zoning plays in segregation); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 83-147 (1993) (offering detailed accounts of this pattern of segregation and the role of government policies and practices in creating and maintaining it).

10. *See generally* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995); John M. Payne, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689 (1997); John M. Payne, *Norman Williams, Exclusionary Zoning and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665 (1996) (discussing how the *Mount Laurel* rulings created the impetus for New Jersey’s Fair Housing Act).

11. HAAR, *supra* note 10, at 30.

12. *See* DUANE LOCKHARD, NEW ENGLAND STATE POLITICS 4-5 (1959).

housing built in the suburbs if they are forced to do so by pressure from the courts.<sup>13</sup>

For a number of years the Massachusetts statute stood as the only example of a state's departure from the pattern of local government control and presumptive validity in land use zoning that was established by the *Euclid* decision in 1926,<sup>14</sup> and its impact was confined to a small number of communities within the Bay State.<sup>15</sup> However, in the past decade, chapter 40B has been used explicitly as the model for similar legislation in Connecticut<sup>16</sup> and Rhode Island,<sup>17</sup> and since the mid-1980s, its impact on municipalities in Massachusetts has grown substantially. The extension of 40B's influence increases the value of assessing the law's impact, its accomplishments, and limitations. Its longevity and ability to survive numerous legislative attacks and challenges in the courts, as well as significant changes in the state's political regime and administration over three decades, make it important to explore how the law has evolved. Following a summary of the law's origins and chief provisions, this Article presents the key findings from the Author's research. These findings suggest that despite intense initial resistance and some important limitations, chapter 40B has resulted in the production of a substantial amount of affordable housing in Massachusetts and has significantly altered the geography of affordable housing and the suburban landscape in this state. The Article then turns to a consideration of how and why the law has evolved over time.

## I. ORIGINS, PASSAGE, AND PROVISIONS OF CHAPTER 40B

A detailed description of the origins and legislative twists and turns of the Comprehensive Permit and Zoning Appeals Act can be found elsewhere,<sup>18</sup> but the key factors responsible for the law's pas-

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13. HAAR, *supra* note 10, at 178; KIRP ET AL., *supra* note 10, at 112-14; Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C. R.-C.L. L. REV. 623, 624-25 (1987).

14. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

15. Sharon Perlman Krefetz, *The Massachusetts Anti-Snob Zoning Law: Who Wanted What, Who Got What, and So What?* 23 (Nov. 1977) (paper presented at the Northeastern Political Science Association Annual Meeting) (unpublished manuscript, on file with Western New England Law Review) (reporting that the author, in 1977, studied the impact of chapter 40B and found that 75 Comprehensive Permit applications had been submitted in 61 communities and approximately 1700 units of low- and moderate-income housing had been built using the statute).

16. CONN. GEN. STAT. § 8-30g to 8-30h (1999).

17. R.I. GEN. LAWS § 45-53-1 to 45-53-8 (1999).

18. Emily Fabrycki Reed, *Tilting at Windmills: The Massachusetts Low and Mod-*

sage are important to note. The push for chapter 40B began in 1967 when a group of young, liberal legislators and housing activists skillfully seized upon the national “Do Something” climate of opinion (regarding the urban crisis, racial segregation, shortage of decent housing, inner city decline and unrest) and capitalized on the political context in the Massachusetts legislature.<sup>19</sup> The latter included overwhelmingly Democratic control, powerful House and Senate leadership positions held by urban-based politicians, and considerable “political baggage” left over from the passage of the “Racial Imbalance Act”<sup>20</sup> in 1965. That controversial Act, which mandated the correction of racial imbalance in public schools, defined an “imbalanced” school as one with more than 50% non-white enrollment; therefore, given racial residential patterns in metropolitan areas, it effectively applied only to urban school districts.<sup>21</sup>

Apparently motivated in part by a desire to create an awkward situation for Republican Governor Francis Sargent, and by the opportunity for retaliation against the suburban “armchair liberals” who had voted for the Racial Imbalance Act, House Speaker David

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*erate Housing Act*, 4 W. NEW ENG. L. REV. 105 (1981); Allan G. Rodgers, *Snob Zoning in Massachusetts*, 1970 ANN. SURV. MASS. L. 487 (1971) (discussing the earlier period of the law); Paul R. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening up the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992) (providing a comprehensive overview and critique of the statute); Paul M. Vaughn, Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U. L. REV. 37 (1974); Alex Johnston, Chapter 774 After 25 Years (1994) (unpublished A.B. thesis, Harvard University) (on file with Harvard University Library) (providing a more recent analysis of the political circumstances that led to the passage of chapter 40B); Krefetz, *supra* note 15 (drawing on Martin A. Linsky & Robert L. Turner, *Watch Out Suburbs—Here Come the Cities* (1970)); Sylvia B. Perlman, *The Massachusetts Anti-Snob Zoning Law: Its Drafting and Passage* (1976) (unpublished graduate seminar paper, Florence Heller School, Brandeis University) (on file with Western New England Law Review); Margaret Power, *Metropolitan Policy and State Politics* (1974) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with M.I.T. Library); Karen Schneider, *Innovation in State Legislation: The Massachusetts Suburban Zoning Act* (1970) (unpublished A.B. thesis, Radcliffe College) (on file with author).

19. In 1967, affordable housing advocates were able to convince legislative leaders to direct the Legislative Research Council to study the possibility that communities were using their zoning power to exclude minority groups. See COMMONWEALTH OF MASS. LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO RESTRICTING THE ZONING POWER OF CITY AND COUNTY GOVERNMENTS, S. 165-1133, 2d Sess., at 140-41 (Mass. 1968) (finding no evidence of widespread intentional discrimination, but concluding that de facto racial and class segregation resulted from a number of local zoning practices).

20. MASS. GEN. LAWS ch. 71, § 37C - D (1998); see also ch. 15, § 1I (outlining the board of education’s role in eliminating racial imbalance).

21. See ch. 71, § 37D.

Bartley and Senate President Maurice Donahue (who were both from Holyoke, a city that had been on the “losing side” of the 1965 battle) used their political muscle to help maneuver the bill through their chambers and lined up the critical margin of winning votes for chapter 40B.<sup>22</sup> The bill’s narrow victory—by a small margin in the House and just two votes in the Senate—came from the votes of a solid core of central city Democratic legislators, a split, but significant, vote from suburban Democrats who were induced to toe the party line, and a small number of votes from suburban liberal Republicans.<sup>23</sup> Governor Sargent, from the affluent suburb of Dover, was then lobbied intensively by housing advocacy groups and young liberals on his staff, and signed the bill in August 1969.<sup>24</sup>

The main provisions of chapter 40B reveal its sponsors’ keen and early awareness of some of the major obstacles that typically prevent low- and moderate-income housing from being built in the suburbs. First, chapter 40B created a simplified, streamlined procedure that “qualified developers”—any public agency, a non-profit organization, or “limited-dividend organization”—can use when proposing a low- and moderate-income housing project.<sup>25</sup> Developers using chapter 40B need only apply to one local authority, the Zoning Board of Appeals (“ZBA”), for a Comprehensive Permit (“CP”) to build subsidized housing.<sup>26</sup> Upon receiving a CP application, the ZBA is required to notify other local boards and hold a public hearing within 30 days.<sup>27</sup> It must then grant or deny the CP within 40 days of the hearing.<sup>28</sup> The drafters reasoned that by eliminating the usual complex, and therefore, frustrating and costly process of requiring separate approvals from a variety of local bodies (such as the planning board, the building inspector, and the board of health), developers would be stimulated to propose low- and moderate-income housing projects.<sup>29</sup>

Second, chapter 40B grants developers the right to appeal adverse local decisions—either outright denials of permits, or approv-

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22. Krefetz, *supra* note 15, at 7-10; Power, *supra* note 18, at 119, 121-22.

23. Power, *supra* note 18, at 119-21.

24. *See* Krefetz, *supra* note 15, at 8.

25. Ch. 40B, § 21.

26. *Id.*

27. *Id.*

28. *Id.*

29. H.R. 166-5429, 1st Sess., at 2 (Mass. 1969) The Committee on Urban Affairs Report noted that “the process of obtaining local approval [for low and moderate income housing] is so protracted as to discourage all but the most determined and well-financed builders.” *Id.*

als with conditions attached that make the project “uneconomic”—to a special state body, the Housing Appeals Committee (“HAC”), which the legislation created.<sup>30</sup> The HAC, whose five members are appointed by the Governor and the head of the Massachusetts Department of Community Affairs<sup>31</sup> is authorized in the case of an outright denial of an application, or an approval with conditions deemed “uneconomic” from the developer’s perspective, to conduct a hearing to determine whether a ZBA decision was “reasonable and consistent with local needs.”<sup>32</sup> Most importantly, if the HAC determines that a ZBA decision was not reasonable and consistent with local needs, it is empowered to override the local ZBA decision and grant the CP to the developer.<sup>33</sup>

This state-level appeal and override provision was by far the most controversial feature of the law, as municipalities saw it as a flagrant violation of local political autonomy and home rule. The backers of chapter 40B viewed it as an absolutely essential re-assertion of the state’s ultimate power in zoning matters.<sup>34</sup> It was intended to ensure that if localities exercised their state-delegated authority “unreasonably” by turning down proposals to build low- and moderate-income housing, developers would have immediate recourse to bring an appeal to an autonomous, quasi-judicial state body.<sup>35</sup> This appeal provision significantly improved the options for developers, who absent it were forced to either abandon a locally-rejected proposal or face a lengthy and expensive court battle to try to get the decision overturned.<sup>36</sup>

The law also established standards for determining whether a ZBA denial is “consistent with local needs,” and by so doing effectively set an affordable housing goal, or fair share quota or threshold, for all communities.<sup>37</sup> Specifically, chapter 40B provides that developers are not entitled to a HAC appeal, and thus a ZBA decision will stand, if any one of the following conditions which define

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30. Ch. 40B, § 22.

31. This was later renamed the Executive Office of Communities and Development (“EOCD”) and was subsequently re-organized as the Department of Housing and Community Development (“DHCD”).

32. Ch. 40B, § 23.

33. *Id.*

34. Krefetz, *supra* note 15, at 14.

35. See ch. 40B, § 22 (providing for a right to appeal).

36. See Sharon Perlman Krefetz, *Low- and Moderate-Income Housing in the Suburbs: The Massachusetts “Anti-Snob Zoning” Law Experience*, 8 POL’Y STUD. J. 288, 290 (1979).

37. Ch. 40B, § 20.



what “consistent with local needs” means, has been met by a community: (1) at least 10% of its total housing stock consists of subsidized housing for low- and moderate-income households; (2) at least 1.5% of its land zoned for residential, commercial, or industrial use is used for such housing; or (3) a proposed development would result within one calendar year in the start of construction of low- and moderate-income housing on more than 0.3% of the town’s land zoned for residential, commercial, or industrial use, or ten acres, whichever is larger.<sup>38</sup> This provision was intended to give an incentive to communities to take the initiative to develop a “reasonable” amount of subsidized housing, i.e., at least 10% of their total housing, in order to become immune to the appeal process.<sup>39</sup>

The Administrative Regulations for chapter 40B also specify that when an appeal of a ZBA denial or approval with “unecconomic” conditions is brought to the HAC, the burden of proof is on the local zoning board to demonstrate that there is “a valid health, safety, environmental, design, open space, or other local concern . . . [which] outweighs the regional housing need.”<sup>40</sup> This is a very significant requirement since historically the courts have given “presumptive validity” to the decisions of local authorities in zoning cases.<sup>41</sup>

The Massachusetts law clearly broke new ground in the battle against exclusionary zoning. Though its initial impact was quite limited<sup>42</sup>—and even after 30 years it has by no means achieved the ambitious goals of its backers—chapter 40B has had significant im-

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38. *Id.* (defining “consistent with local needs” as used in the text of section 23, which governs when appeals will be heard).

39. See JAMES BREAGY, CITIZENS HOUSING AND PLANNING ASSOCIATION REPORT, OVERRIDING THE SUBURBS 15-16, 51-52 (1976) (discussing the “consistent with local needs” definition and the requirement of 10% in order to avoid appeals).

40. MASS. REGS. CODE tit. 760, § 31.06(6) (1993); *id.* § 31.06(7).

41. See Terry J. Tondro, *Connecticut’s Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. (forthcoming 2001) (discussing the significance of this change in the burden of proof with regard to sections 8-30g to 8-30h of the Connecticut General Statutes); Melinda Westbrook, *Connecticut’s New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions*, 66 CONN. B.J. 169, 172 (1992).

42. Krefetz, *supra* note 15, at 20, 33. By September 1979, 111 CPs had been applied for in 82 communities, and approximately 3400 units of low- and moderate-income housing—most of it for the elderly—had been built using the law. See ELISABETH A. RUBEN & CONSTANCE WILLIAMS, CHAPA, THE USE OF COMPREHENSIVE PERMITS FOR HOUSING LOWER INCOME HOUSEHOLDS IN MASSACHUSETTS 2 (1979). Nearly all of the CP applications that had been granted outright (20 of 24) were for elderly housing; the majority of the CPs that were denied outright, and granted with conditions, were proposals for family housing. See Krefetz, *supra* note 36, at 288-99.

act and has resulted in the construction of affordable housing in a substantial number of communities.<sup>43</sup> Following a description of the methods used to gather data, the next section of this Article examines the Act's overall impact and changes over time in the pattern of local responses to the law, as well as in the actions of state officials charged with administering it.

## II. ASSESSING CHAPTER 40B'S OVERALL IMPACT

### A. *Methods and Database*

Systematic data on CPs applied for, decisions of local zoning boards on CP applications, and housing units built through the CP process is, unfortunately, not collected by any state agency.<sup>44</sup> The only way to obtain such data is by surveying local officials, which individuals and organizations interested in the statute, including this Author, have done at several junctures since the law's inception.<sup>45</sup> In March 1997, under the aegis of Clark University's Public

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43. See *infra* Part II.B.1 for a discussion of the impact of chapter 40B.

44. The HAC does keep records of ZBA decisions on CP applications that are appealed to it, but neither the HAC nor any other state office receives information on all other CPs that are applied for and granted outright or granted with conditions that do not result in appeals to the HAC. Moreover, no state or local office tracks whether housing projects proposed under chapter 40B actually get built. While some ZBA officials, typically in the smaller towns, are well aware of the ultimate status of such projects, in many cases the only way to find out whether the project was built is to check the records of the town's building department. This process is complicated by the fact that building projects are recorded by their street location and not by their name, whereas CP applications list projects by the developer's name and/or project name and rarely include the street address for the property. Tracking the fate of CP project proposals is further confounded by the fact that the state's Subsidized Housing Inventory includes the location and the names of projects as they were known when they were built, but these names may differ from the original name used on the CP applications and/or building permits.

45. See Krefetz, *supra* note 15 (reporting results of Author's telephone survey); see also STATUS AND STATISTICAL REPORT OF APPEALED CASES (Sept. 15, 1976) (reporting the status of known CP applications that were and were not appealed to the HAC despite the title's reference to only appealed cases). Subsequent surveys were done in 1978-79. RUBEN & WILLIAMS, *supra* note 42 (reporting a 1978-79 survey); Margaret R. Guzman, Chapter 774: Anti-Snob Zoning, Two Decades of Impact (Apr. 1989) (unpublished B.A. honors thesis, Clark University) (on file with Western New England Law Review); Cynthia Lacasse, An Overview of Chapter 774: The Anti-Snob Zoning Law (Mar. 1987) (unpublished manuscript, on file with Western New England Law Review) (incorporating the 1986 work of HAC intern Emily Kane). Unfortunately, the surveys done for the HAC by Kane in 1986 and Guzman in 1988-1989 were lost when the HAC moved to a new location in the early 1990s. The data in Guzman's report was collected for the HAC, where she served in 1988-1989 as an intern to Murray Corman, who was the HAC Chair and Counsel from 1970-1990. Her findings were reported by Corman to the Special Commission Relative to the Implementation of Low and Moder-

Affairs Research Center, this Author sent a questionnaire to the zoning boards of appeals in all 351 Massachusetts cities and towns. Replies to the survey, which sought information about CP applications submitted and their outcomes (i.e., whether the projects were ultimately built), were received from officials in 227 communities, a 65% response rate.<sup>46</sup> Over the past two years, this dataset was enlarged and updated by adding information on CPs applied for in an additional 63 communities, using the results of a similar survey conducted by the Citizens' Housing and Planning Association ("CHAPA"),<sup>47</sup> case records of the HAC,<sup>48</sup> a listing of Local Initiative Program ("LIP") applications that sought CPs,<sup>49</sup> information provided by the Massachusetts Housing Finance Agency ("MHFA") on Site Approvals known to have involved CPs,<sup>50</sup> and

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ate Income Housing Provisions (also known as the Grace Commission), which used the findings in its 1989 Report. See REPORT OF THE SPECIAL COMM'N RELATIVE TO THE IMPLEMENTATION OF LOW AND MODERATE INCOME HOUS. PROVISIONS 8-9 (1989) [hereinafter GRACE COMM'N REPORT]; see also U.S. DEP'T. OF HOUS. & URBAN DEV., REMOVING REGULATORY BARRIERS TO AFFORDABLE HOUSING: HOW STATES AND LOCALITIES ARE MOVING AHEAD (1992) [hereinafter HUD REPORT] (citing Guzman's data).

46. The initial response to the mail survey was considerably lower, but telephone calls to town clerks, zoning board chairs and secretaries by persistent and persuasive research assistants helped yield many more returns of completed surveys.

47. See RUBEN & WILLIAMS, *supra* note 42.

48. Listings of the status of HAC cases as of January, 1997 and July, 1999 were reviewed. Additional information on individual cases decided was obtained, using reports available from the HAC and from the Social Law Library in Boston. Information was also obtained from the HAC files on cases that did not have decisions rendered. Werner Lohe, Chair of the Housing Appeals Committee, generously allowed the Author to spend many hours reading through case files. He patiently explained the various disposition categories and possible changes in the coding of cases over time, and provided updates on the status of cases through October, 1999. He bears no responsibility for the Author's decisions about how to code cases or for her interpretation of the information in the reports and files that are included in this dataset.

49. The Local Initiative Program was created within EOCD by administrative regulations in 1990 "to give cities and towns . . . more flexibility in their efforts to provide low and moderate income housing." MASS. HOUS. P'SHIP, EXECUTIVE OFFICE OF CMTYS. & DEV., LOCAL INITIATIVE PROGRAM: GUIDELINES FOR COMMUNITIES 1 (Apr. 1990) [hereinafter LIP GUIDELINES]. The Program allows developers who do not have a government subsidy to use the CP process if, inter alia, at least 25% of the units they propose are affordable and they receive the approval of the chief elected official of the city or town. *Id.* at 5. See also *infra* notes 129-42 and accompanying text for a discussion of the Local Initiative Program. Information on LIP projects that sought CPs was culled from the "Local Initiative Program Pipeline" lists dated November, 1996 and June, 1999, Department of Housing and Community Development. Bert Rodiger and Mary Bobadilla made these lists available to the Author, though neither of them is responsible for her interpretation of the data.

50. The "MHFA Site Approval Listing of Developments" and the "MHFA Developments Closed" lists through May, 1999 were reviewed to check on projects known

cases reported at CHAPA's October, 1999 Conference on 40B.<sup>51</sup> The database thus contains information on a total of 290 cities and towns,<sup>52</sup> which constitutes 83% of all Massachusetts communities.<sup>53</sup> The Author also interviewed over 20 state and local officials who have had direct experience with chapter 40B over the past two decades.<sup>54</sup>

The communities in this study include the vast majority of all suburbs in the Boston, Worcester, and Springfield areas, as well as most Cape Cod towns. Those that did *not* reply to the survey were, for the most part, small, rural towns in the western part of the state, although Boston and a small number of Boston area suburbs were also among the non-respondents. Overall, the localities likely to have had the most growth and housing development activity are well-represented. Therefore, the non-response bias does not pose a major threat to the reliability of the data. However, it is important to note that since it is possible, and even likely, that CPs were applied for in some of the 61 cities and towns *not* included in this study, the data probably undercounts the number of communities directly affected by chapter 40B. Consequently, the numbers reported for total CP applications, total housing units proposed, and total housing projects and units built are conservative figures and

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or likely to have sought CPs. Nancy Andersen and John Drew made these lists available and explained how to try to ascertain which projects were likely to have involved CPs. John Drew also graciously assisted in locating more detailed information on some of the projects in the MHFA files. Neither Ms. Anderson nor Mr. Drew is responsible for the Author's interpretation of the MHFA data.

51. See Stacey Zelbow, *Case Studies of Successful Comprehensive Permit Developments*, CITIZENS' HOUSING AND PLANNING ASSOCIATION ("CHAPA") (Oct. 21, 1999); Murray Corman Awards for Outstanding Achievement in Implementing the Massachusetts Comprehensive Permit Statute, CHAPA conference in Celebration of the 30th Anniversary of Chapter 40B (Oct. 21, 1999) (on file with author). The main CHAPA Conference Report made extensive use of data reported by this Author in a presentation to the Select Committee on Housing, Connecticut House of Representatives, February 10, 1998, and of updated summaries of patterns this Author found in the data on 636 CP applications, as of August, 1999. See Ann Verrilli, *Using Chapter 40B to Create Affordable Housing in Suburban and Rural Communities of Massachusetts: Lessons Learned and Recommendations for the Future*, CHAPA (Oct. 1999).

52. See *infra* app. A for a list of cities and towns in the database.

53. Note that the data drawn from HAC cases introduces a potential bias in the direction of ZBA denials of CPs or CPs granted with conditions rather than granted outright. However, the data obtained from the LIP Project listings offsets this bias because developers of LIPs seeking CPs must first get the approval of the local chief executive, which makes ZBA approval of the CP application more likely. See *infra* note 131 and accompanying text for a discussion of the requirement for executive approval.

54. See *infra* app. B for a list of these officials.

thus should be viewed as minimums. To highlight this likely undercounting, the term “at least” is used frequently in the presentation of the findings.

## B. Overall Findings<sup>55</sup>

### 1. Stimulating Proposals and Getting Affordable Housing Built

Since its inception 30 years ago, the Act has stimulated a sizeable number of proposals for low- and moderate-income housing<sup>56</sup> and has, in fact, *produced* a substantial amount of such housing in the suburbs of Massachusetts.<sup>57</sup> Specifically, since chapter 40B went into effect, at least 655 applications for CPs to build over 50,000 units of housing have been submitted to zoning boards in at least 221 cities and towns<sup>58</sup> throughout Massachusetts. As of October 1999, more than 21,000 units of housing, approximately 18,000 of which are affordable units,<sup>59</sup> have been built with 373 CPs.

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55. It is important to point out that due to incomplete information in the state and local records consulted, as well as in some of the surveys provided, the totals for individual items reported in the figures and tables below are, in some instances, lower than the overall number of CP cases in the dataset. See *infra* fig. 1; apps. C, D. For example, for a few of the CPs, there was missing data on one or more of the following variables: type of developer, type of project proposed, number of units proposed, or CP application year. Moreover, for reasons explained in note 44, information on whether the project was eventually built or not was difficult to obtain in more than a few cases.

56. See *infra* fig. 1 and app. C for a map and list of cities and towns that have submitted applications since 1970.

57. See *infra* fig. 2 and app. D for a map and list of cities and towns where such housing has been built since 1970.

58. See *id.*

59. It is important to note that past studies, including reports by the HAC and this Author, Krefetz *supra* note 15, at 20-22, tbl.4, have slightly overstated the amount of affordable housing proposed and built through chapter 40B because they used the total number of units, although a small fraction of these are actually market-rate units. The “counting” of affordable units is complicated and confusing because while most projects built were exclusively for low- and moderate-income households (where moderate means those with incomes 80% or less than the area median income and low means those with incomes 50% or less than the median), in projects with state and federal subsidies for mixed-income rental housing, all the units count as “subsidized housing” and are included in the calculation of where the community stands with respect to the 10% goal. See *Zoning Bd. of Appeals (Wellesley) v. Hous. Appeals Comm.*, 433 N.E.2d 873, 876 (Mass. 1982) (affirming the HAC decision that allowed the developer to qualify to use the chapter 40B process when the proposed development included market-rate units as well as subsidized units).

State rental programs, such as TELLER and SHARP, see *infra* notes 110-11 and accompanying text for a discussion of these programs, require a minimum of 20 or 25% of the units to be affordable. HOP projects, see *infra* note 113 and accompanying text for a discussion of this program, required a minimum of 25 or 30% affordable units, but the market-rate units are not included in the calculation of chapter 40B units. These

As a direct result of the Comprehensive Permit and Zoning Appeals Act, low- and moderate-income housing has been built in at least 173 cities and towns.<sup>60</sup> Most of these CP housing developments are located in the suburbs of Boston, Worcester, Springfield, and Fall River, and on Cape Cod.<sup>61</sup> The fact that chapter 40B has directly resulted in the construction of affordable housing in approximately half of all municipalities in Massachusetts, and in most of the state's suburbs, suggests that it has had quite a dramatic impact on the landscape. Indeed, chapter 40B has profoundly altered the geography of affordable housing in Massachusetts.

Chapter 40B's significant impact can also be seen by comparing figures from the state's Subsidized Housing Inventory over time. While the number of communities at or above the 10% affordable level only rose from 3 (Boston, Holyoke, and Fall River) in 1972 to 23 in 1997, the number of communities with *no* subsidized housing dropped significantly, from 173 to 55.<sup>62</sup> These latter figures indicate that nearly half of all Massachusetts cities and towns had no affordable housing units shortly after chapter 40B went into effect, whereas by 1997 only 15% lacked such housing. Most of the communities that continue to have no subsidized housing units are very small, rural towns<sup>63</sup> in the western part of the

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minimum percentages of affordable units were typically exceeded in most projects, and many were built as 100% affordable. As a result, state officials report that approximately 86% of all the units that are counted towards the 10% threshold in the state's Subsidized Housing Inventory are actually affordable. Cover letter to the State Subsidized Housing Inventory from Jane Wallis Gumble, Director of the Department of Housing & Community Development (Aug. 1, 1997) (on file with Western New England Law Review). This Author arrived at a similar estimate, i.e., about 85%, looking at break-downs of affordable versus market-rate units in all projects for which information was provided by the communities responding to the Author's 1997 survey.

It is also important to point out that the report HAC Chair, Murray Corman, presented to the Grace Commission in 1989 listed a total of 33,884 units proposed and 20,623 units built or to be built "shortly." GRACE COMM'N REPORT, *supra* note 45. The latter number included 6017 units that were still in the planning stage. *Id.* Due to altered conditions in the housing market and in state housing subsidy funding (discussed below) soon after that report was presented, it is likely that many of these projects did not get built. So, the 14,606 figure reported as built or under construction seems a more reliable number for that time, *id.*, and of these, approximately 12,200 were likely to have been affordable.

60. See *infra* app. D for a list of these cities and towns.

61. See *infra* fig. 2 for a map of these communities.

62. See Mass. Dep't of Hous. & Cmty. Dev., Chapter 40B Subsidized Housing Inventory (July 1, 1997) (on file with author).

63. Of the 55 towns with no subsidized housing as of 1997, almost half (27) had fewer than 500 units of housing; 21 had between 500 and 1000 units; 6 had between 1000 and 2000 units; and only one had between 2000 and 3000 housing units. See *id.*

state, where housing costs and demand are relatively low, and only one suburb of Boston (Boxborough) had no affordable housing as of 1997.<sup>64</sup>

While a number of factors have contributed to this change, chapter 40B has certainly had a pronounced effect. Over 60% of the 119 communities that went from having no affordable housing in 1972 to having some built by 1997, including many suburbs of Boston, had housing built directly through the CP process.<sup>65</sup> While it would be unreasonable to conclude that all the other towns that increased their supply of affordable housing did so indirectly because of the statute, it is not unreasonable to assume that the existence of chapter 40B (and related actions by the state Executive Office of Communities and Development) did spur some communities to be more receptive to, and possibly even encourage, the building of affordable housing outside of the CP process.<sup>66</sup>

So, while relatively few communities have reached the 10% goal that chapter 40B set for affordable housing, it is important to recognize that this target was actually an arbitrary number intended to stimulate a "reasonable supply" of affordable housing.<sup>67</sup> Progress *toward* that goal in a good number of communities is noteworthy: whereas in 1972 only 4 communities had between 7 and 10% low- and moderate-income housing, and all of these were cities (Cambridge, Lawrence, Malden, and Quincy), 44 communities had this amount in 1997.<sup>68</sup> A sizeable number of these communities are suburbs, including several middle- and upper-middle-class suburbs, such as Framingham, Burlington, Littleton, Andover, and Westwood, in which multiple CP projects have been built.<sup>69</sup> While "only" about 20% of all the subsidized housing built since the early 1970s was built directly through chapter 40B, and the number of units built overall still falls far short of the need for such housing,<sup>70</sup> it seems clear that *without* the Act the amount of affordable hous-

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64. *See id.*

65. *See id.*

66. Verrilli attributes much more indirect influence to chapter 40B, suggesting that "most observers believe 40B has played a role in the development of almost all suburban [affordable housing] developments that did not use the CP process." Verrilli, *supra* note 51, at 15.

67. Schneider, *supra* note 18 (manuscript at 32).

68. *See* Mass. Dep't of Hous. & Cmty. Dev., *supra* note 62.

69. *See id.*

70. The current statewide need for affordable housing is estimated at approximately 100,000 more units. Thomas Grillo, *In Cambridge, a Push for Affordable Housing*, BOSTON GLOBE, Oct. 23, 1999, available at 1999 WL 6089550.

ing that does exist would be much lower, and the locations of this housing would be far more limited (i.e., much more heavily concentrated in the cities and inner ring “suburbs”).

So how has this housing come about? Who has proposed chapter 40B projects? What types of housing projects have been proposed? And how have local officials responded to the proposals? What have been the usage and outcomes of the state appeal process? And how many projects of what type have been built? The next section of this Article addresses these questions.

## 2. Initiators of Chapter 40B Housing Proposals

As intended by the framers of the statute, the one-stop, streamlined permit approval process has proved attractive to developers, especially to private developers seeking to build housing outside the cities.<sup>71</sup> The majority of CP applications (60%) have come from private developers<sup>72</sup> who have used the limited dividend provision<sup>73</sup> to a large extent. Local housing authorities and non-profit organizations have also been active in submitting chapter 40B

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71. It bears noting that the process of moving from CP application to a final decision on a project has not, in many instances, been nearly as fast as chapter 40B's drafters envisioned. The provisions of the statute specify that a public hearing must be held within 30 days of the time an application is filed, and the ZBA must make its decision within 40 days of the close of the hearing. MASS. GEN. LAWS ch. 40B, § 21 (1998). An appeal of the ZBA decision must be filed with the HAC within 20 days; the HAC hearing is supposed to take place within 20 days of receiving an appeal, and the HAC decision must be rendered within 30 days of the hearing. § 22. However, the process can be—and often has been—delayed for a number of reasons. See BREAGY, *supra* note 39, at 41-43. These reasons include the continuation of hearings to get additional information and the extension of deadlines by mutual agreement, as well as significant delays at a number of junctures that were caused by shortages of staff to handle HAC appeals and backlogs in court cases challenging HAC decisions. See *id.* at 42-43. In the first several years after chapter 40B went into effect, one study found that instead of taking the four months the legislative drafters intended, it took an average of 10 months from the time the CP application was filed to the rendering of the HAC decision. *Id.* at 42. Other reasons for delays include additional reviews of proposals for environmental impacts and efforts by the HAC to work out settlements. Krefetz, *supra* note 36, at 292-94; Paul K. Stockman, *supra* note 18, at 571-72. See also *infra* Part III.A for a discussion of important changes in local responses.

72. See *infra* fig. 3 for a chart of who has submitted CP applications.

73. Ch. 40B, § 21. The Code of Massachusetts Regulations defines a limited dividend organization as:

any applicant which proposes to sponsor housing under M.G.L. c. 40B; and is not a public agency; and is eligible to receive a subsidy from a state or federal agency . . . [and] . . . agrees to limit the dividend on the invested equity to no more than that allowed by the applicable statute or regulations governing the pertinent housing program.

MASS. REGS. CODE tit. 760, § 30.02 (1993).



housing proposals, though much less so than private developers, presumably reflecting the fact that non-profit housing groups and housing authorities are more commonly found in the larger cities than in suburbs.<sup>74</sup>

### 3. Type of Housing Proposed

Overall, the majority of proposals (over 60%) have been for family housing, with elderly housing accounting for about one-fourth of the proposals and housing for people with special needs accounting for a small amount of proposals.<sup>75</sup> This ranking roughly parallels the proportional needs for affordable housing. However, this pattern was not present in the first decade after chapter 40B was enacted; rather, it reflects an important shift that has occurred over time.<sup>76</sup>

### 4. Local Responses to Chapter 40B Proposals

Overall, less than 20% of all CP applications included in this study were granted outright by local zoning boards, almost 30% were denied, and just over half were granted with conditions attached.<sup>77</sup> In many instances, the developers felt that the conditions imposed made the projects economically infeasible and appealed them to the state HAC.<sup>78</sup>

### 5. Appeals to the State Housing Appeals Committee ("HAC")

In the three decades since chapter 40B was enacted, developers have made extensive use of the state appeal provision. Over 300 appeals have been brought to the state, requesting overrides of local decisions. Those who received an outright denial of their CP application from the ZBA have almost invariably (i.e., in over 90% of the cases) brought an appeal to the state HAC.<sup>79</sup> ZBA decisions

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74. In fact, the housing authorities of a few cities, such as Worcester and Cambridge, have used chapter 40B to apply for permits to build low- and moderate-income housing because they have found the streamlined, one stop process helpful in reducing the time between submission of an application and approval. Telephone Interview with Jay Woodward, Director of Planning, Brookline, Mass. (July 2, 1997).

75. See *infra* fig. 4 for a chart of types of housing proposals from 1970 to 1999.

76. See *infra* Part III.A.3 for a discussion of this shift.

77. See *infra* fig. 5 for a chart of the disposition of CP applications in the years 1970-1999.

78. See *infra* Part III.B for a discussion of changes in the CP application and HAC appeals process.

79. See *infra* fig. 6 for a chart of these appeals of ZBA decisions.

granting CPs with conditions have been appealed less often, although still to an appreciable extent (i.e., in 48% of such instances).<sup>80</sup>

## 6. Decisions on Appeals

The pattern of decisions by the HAC is striking: local zoning board decisions have been upheld in only 18 cases<sup>81</sup> and overruled

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80. *Id.*

81. In five of these cases, the ZBA decision was upheld on technical rather than substantive grounds. See *Matthew A. Welch v. Bd. of Appeals (Easton)*, No. 94-06, (Mass. Housing App. Committee Feb. 28, 1995) (determining that the project was proposed as a LIP, and since the local executive did not give its approval, the developer could not use the CP process), available at <http://www.nellco.org/DatabasesLicensed/SocialLawLibrary/HousingAppealsCommittee.htm> [hereinafter *Nellco*]; *Johnson v. Zoning Bd. of Appeals (Wareham)*, No. 92-05, at 4-6 (Mass. Housing App. Committee Oct. 13, 1993) (same), available at *Nellco, supra*; *Little Hios Hills Realty Trust v. Plymouth Zoning Bd. of Appeals*, No. 92-02, at 4-9 (Mass. Housing App. Committee Sept. 23, 1993) (same), available at *Nellco, supra*; *Stoneham Heights Ltd. P'ship v. Zoning Bd. of Appeals (Stoneham)*, No. 87-04, at 57-58 (Mass. Housing App. Committee Mar. 20, 1991) (finding that the developer did not establish his eligibility for a subsidy, and therefore, was not a "qualified" developer), available at *Nellco, supra*; *Pioneer Home Sponsors, Inc. v. Northampton Bd. of Appeals*, No. 74-01, at 4-8 (Mass. Housing App. Committee Apr. 1, 1975) (determining that the town had reached the 10% affordable-housing threshold twelve days after the developer submitted the CP application when it approved another affordable housing project, and therefore the ZBA denial was "reasonable" and "consistent with local needs"), available at *Nellco, supra*. In one case, the HAC upheld the conditions the ZBA had set (i.e., requiring that the affordable units remain rental units and affordable in perpetuity) because these conditions were deemed to be aimed at ensuring that the project's affordable units would continue to serve the needs of low- and moderate-income households rather than being converted to market-rate condominiums after 20 years. *Lexington Ridge Assocs. v. Bd. of Appeals (Lexington)*, No. 90-13, at 21-25 (Mass. Housing App. Committee June 25, 1992), available at *Nellco, supra*. In nine cases, a substantive issue, either a health and/or safety concern or a valid planning consideration, was deemed sufficiently serious to outweigh the need for affordable housing; and therefore, in these cases the HAC upheld the ZBA decision. See *Hamlet Dev. Corp. v. Zoning Bd. of Appeals (Hopedale)*, No. 90-03, at 30-31 (Mass. Housing App. Committee Jan. 23, 1992) (safety), available at *Nellco, supra*; *Teti-quet River Vill., Inc. v. Zoning Bd. of Appeals (Raynham)*, No. 88-31, at 8-12 (Mass. Housing App. Committee Mar. 20, 1991) (health and safety), available at *Nellco, supra*; *Mayflower on the Bay Realty Trust v. Bd. of Appeals (Plymouth)*, No. 89-42, at 6-9 (Mass. Housing App. Committee Sept. 19, 1990) (planning), available at *Nellco, supra*; *Brown St. Assocs. v. Zoning Bd. of Appeals (Attleboro)*, No. 82-02, at 13 (Mass. Housing App. Committee Mar. 1, 1983) (health and safety), available at *Nellco*; *Harbor Glen Assocs. v. Bd. of Appeals (Hingham)*, No. 80-06, at 16-17 (Mass. Housing App. Committee Aug. 20, 1982) (planning), available at *Nellco, supra*; *Berkshire E. Assocs. v. Bd. of Appeals (Huntington)*, No. 80-14, at 23 (Mass. Housing App. Committee June 1, 1982) (safety), available at *Nellco, supra*; *Sherwood Estates v. Bd. of Appeals (Peabody)*, No. 80-11, at 8-9 (Mass. Housing App. Committee Apr. 30, 1982) (safety), available at *Nellco, supra*; *Forty Eight Co. v. Zoning Bd. of Appeals (Westfield)*, No. 75-06, at 14 (Mass. Housing App. Committee Aug. 23, 1976) (safety), available at *Nellco, supra*; *Todino v. Bd. of Appeals (Woburn)*, No. 72-04, at 18 (Mass. Housing

in 94 cases.<sup>82</sup> In a substantial number of cases, the parties reached a negotiated settlement after the appeal was heard.<sup>83</sup>

It is quite significant that in cases appealed to the HAC, the Committee rarely has found that the local decision was "reasonable and consistent with local needs." These HAC decisions, along with the consistent Massachusetts court rulings upholding them,<sup>84</sup> suggest that chapter 40B's state override provision is extremely important and very much needed.

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App. Committee Feb. 13, 1974) (health and safety), *available at* Nellco, *supra*. In two other cases, the HAC upheld the ZBA decision because the developer did not satisfy the burden of proof to demonstrate that the conditions imposed by the ZBA would make the project "uneconomic." *Shamrok Constr. Co. & Dev. Corp. v. Bd. of Appeals (Whitman)*, No. 96-02, at 4 (Mass. Housing App. Committee Sept. 26, 1996), *available at* Nellco, *supra*; *Anglewood Hous. Dev. Ltd. P'ship v. Bd. of Appeals (Kingston)*, No. 90-06, at 3 (Mass. Housing App. Committee Aug. 4, 1993), *available at* Nellco, *supra*. In one case, the HAC upheld the ZBA decision because the developer did not prove that the condition imposed, a fee of \$40,000 for connecting to the town water supply, was applied unequally to subsidized and market-rate housing. *Messenger St. Plainville Senior Hous. Dev. P'ship v. Bd. of Appeals (Plainville)*, No. 99-02 (Mass. Housing App. Committee Oct. 18, 1999), *available at* Nellco, *supra*. Unequal requirements, which the developer has the burden of proof to demonstrate, make a ZBA decision inconsistent with local needs. MASS. REGS. CODE tit. 760, § 31.06(4) (1993).

82. See *infra* fig. 7 for a chart of the disposition of HAC cases from 1970-1999.

83. See Interview with Jane Wells, Deputy Director, Mass. Dispute Resolution Service, in Boston, Mass. (Feb. 2, 1997) (data on cases settled through formal negotiation process).

84. According to HAC records as of 1996, since chapter 40B's enactment, 34 court actions had been brought appealing HAC decisions. See *H.A.C. Decisions with Subsequent History* (Mar. 21, 1996) (on file with author). From the beginning, the courts have consistently upheld the HAC decisions and, in some notable cases, including the landmark Massachusetts Supreme Judicial Court combined ruling on the first two suits challenging HAC decisions, *Hanover* and *Concord*, have clarified and expanded the intent of chapter 40B. In its initial ruling, the Court upheld the constitutionality of the Act and rejected the towns' argument that it violated home rule. *Bd. of Appeals (Hanover) v. Hous. Appeals Comm.*, 294 N.E.2d 393, 407-10 (Mass. 1973). Another very important ruling came in the *Wellesley* case. See *Zoning Bd. of Appeals v. Hous. Appeals Comm.*, 433 N.E.2d 873, 874-75 (Mass. 1982). In only one ruling has the court remanded a case to the HAC for a new hearing, and that was because it found a procedural flaw. *Bd. of Appeals (Southbridge) v. Hous. Appeals Comm.*, 4 Mass. L. Rptr. No. 18, at 392 (Super. Ct. 1995). The flaw was, in fact, due to most unusual circumstances: Murray Corman, the longtime HAC Chair and Counsel, had heard the case but died before rendering a decision on it; the opinion was written by his successor, Werner Lohe, who had been present for two of the three days of hearings, and the other members of the HAC had reviewed a transcript of the hearings but had not attended them. *Id.* Other chapter 40B litigation has involved suits by developers and abutters against zoning boards of appeals. See *e.g.*, *Bell v. Zoning Bd. of Appeals (Gloucester)*, 709 N.E.2d 815 (Mass. 1999) (abutter); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152 (Mass. 1987) (developer). See generally MARK BOBROWSKI, *HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW* (1993) (reviewing many chapter 40B cases).

### 7. Housing Built with a Comprehensive Permit

Although less than half of the total number of proposed chapter 40B units have been built, the majority of the proposed *projects*, at least 55%, have come to fruition.<sup>85</sup> The majority of these completed projects were for families.<sup>86</sup> Of the remaining projects, 30% were for the elderly, 12% were mixed family and elderly units, and a few were “special needs” housing projects.<sup>87</sup>

These findings suggest that while the Massachusetts Comprehensive Permit and Zoning Appeals Act has not achieved the ambitious and lofty goals of its proponents, it has had considerable impact on overcoming some of the obstacles created by exclusionary zoning. Over the past thirty years, chapter 40B has resulted in the creation of a non-trivial amount of much-needed affordable housing in many communities throughout the state and has “opened up” housing opportunities that would not otherwise be available for low- and moderate-income households in many Massachusetts suburbs.

### III. THE EVOLUTION OF CHAPTER 40B

The overall findings regarding chapter 40B’s impact may give the impression that the law produced immediate results in getting affordable housing proposed, approved, and built. However, a closer look at the patterns in different time periods makes clear that “opening up” did not occur overnight; indeed, many communities had to be pried open. As the data in Tables 1 through 6 suggest, there has not been a steady, linear progression in chapter 40B activities or impact. Although the statute itself has not been modified since it was passed, important changes in economic and political conditions, subsequent turnover in government personnel, and resulting shifts in approaches, programs, and funding, have significantly affected local and state responses to the law over time.

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85. This is definitely an undercount because of incomplete local records and changes in the names of the developers or the projects. See *supra* note 44 for a further discussion of the problems with counting completed chapter 40B projects. This problem with record-keeping made it impossible to ascertain the status of 51 projects, some of which probably were built. Also, not all of the projects approved in the past have actually been built. See *supra* note 44 for a discussion of the difficulty in ascertaining which approved projects were actually built. Accordingly, the Author did not include in this count as “built” projects that had received CPs as of November, 1999, and had “construction pending” unless verification that the project had, in fact, been completed, was obtained from the local Building Inspector.

86. See *infra* fig. 8 for a chart of types of completed projects.

87. *Id.*

The thirty year life span of the Comprehensive Permit and Zoning Appeals Act can be divided into four distinct periods,<sup>88</sup> each shaped by important economic and political factors: (1) 1970-1979, a turbulent era after the initial passage of the law; (2) 1980-1984, a period of relative calm followed by some increased activity; (3) 1985-1989, a time of greatly increased activity; and (4) 1990-1999, an era in which local influence was re-asserted in what can be characterized as a "Quiet Counter-Revolution."<sup>89</sup> Reasons for variations in local and state actions and reactions during these time periods are discussed in Section III.B below. Before turning to that discussion, however, a comparison of key patterns in the earliest decade with those in the most recent one will highlight some of the most significant changes that have occurred over time in local zoning board and state HAC decisions, as well as in the types and sizes of projects proposed by developers.

A. *Important Changes in Local Responses, State Actions, and Characteristics of the Projects*

1. *Decrease in Local Zoning Board Denials of CP Applications*

Outright denials of CP applications have declined from over 40% in the 1970s to 20% in the 1990s, and there has been a significant rise in the granting of both CPs outright and CPs with conditions.<sup>90</sup>

2. *Decrease in State Appeals Decisions Overruling ZBA Decisions*

The proportion of local decisions overruled when appealed to the HAC has decreased appreciably, from 45% in the 1970s to 25%

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88. See Sharon Perlman Krefetz et al., *Suburban Exclusion in the 1990s: High Walls, Small Toeholds* 30-35 (Sept. 2, 1990) (unpublished manuscript presented at the Annual Meeting of the American Political Science Association) (on file with author) (offering a more detailed description of the first three periods).

89. Bosselman and Callies use the term "Quiet Revolution" to describe the re-assertion of authority over land use decisions by some states in order to deal with "problems of statewide significance." See FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* 3 (1971). The examples of the "revolution" that they cite mainly involve state actions to address threats to the environment, although they also note actions aimed at combating social problems such as "the shortage of decent housing." *Id.* The one detailed example they provide of a state that had a "quiet revolution" to address a social problem was Massachusetts, via the passage of chapter 40B. *Id.* at 164-86.

90. See *infra* tbl. 1 for data on the disposition of CP applications.

in the 1990s, and the proportion of cases decided by “stipulation,” meaning by a negotiated compromise between the parties, has increased markedly from 13% to 38%.<sup>91</sup>

### 3. Shift in Type of Housing Proposed and Built

From the 1970s to the 1990s, there has also been a marked shift from housing proposed predominantly for the elderly (nearly half of the CP applications in the earlier period in contrast to less than 15% in the latter) to housing proposed primarily for families (about 75% of the applications in the 1990s compared to about 40% in the 1970s).<sup>92</sup> This important change is also reflected in the pattern of housing actually built: a majority of the projects built in the 1970s (56%) were for the elderly, whereas approximately 75% of the projects constructed in the 1990s were for families.<sup>93</sup> This reversal of the early pattern and the increased number of projects over time have produced the overall finding noted earlier, namely that the majority of chapter 40B projects and units built since chapter 40B’s inception have been for family housing.<sup>94</sup>

These three shifts suggest some encouraging trends regarding proposals for chapter 40B housing; specifically, local officials and developers have become increasingly willing to work out compromises acceptable to both sides to enable projects to go forward. Developers and local officials have also become more responsive to the growing need for affordable family housing.

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91. See *infra* tbl. 2 for data on HAC appeals. It is possible, and even likely, that some of the cases that were withdrawn and some of the cases that were classified as “other”—meaning “closed” but not decided by the HAC—were also settled by a negotiated compromise between the developer and the ZBA. The coding of cases was done at different times by at least two different HAC staff members: Edwin Kelly, the HAC Clerk, kept the records and classified cases prior to January, 1991; and Werner Lohe, the HAC Chair, has done the classifying since then. Werner Lohe noted that they may have classified cases differently. Interview with Werner Lohe, Chair, Housing Appeals Committee, in Boston, Mass. (Jan. 27, 1997). Even the “simple” counting of cases sometimes called for a judgment, since some cases came back to the HAC and were amended after the initial decision or stipulation. When the decision was amended soon after the original decision and only in a minor way, this Author regarded it as the same case; when a major change was involved after a considerable period of time, however, the decision was coded as a new case.

92. See *infra* tbl. 3 for data regarding types of housing proposals.

93. See *infra* tbl. 4 for data regarding types of projects built.

94. See *supra* text accompanying note 75 for an earlier discussion of this finding about chapter 40B housing.

#### 4. Decrease in the Size of the Projects Proposed and Built

The size of chapter 40B housing projects has decreased sharply from the 1970s to the 1990s.<sup>95</sup> Over half of the projects proposed, and nearly half of the projects built in the first era, had 100 or more units, whereas over half of the projects proposed in the current period have had less than 50 units, and more than half of those *built* in the 1990s have less than 25 units. While small scale projects have certain advantages (for example, they blend into the surrounding area more readily and are likely to be less objectionable to neighbors), the reduction in the number of units means that, overall, fewer low- and moderate-income households are served by the housing built. This is a worrisome trend at a time when the need for affordable housing is becoming more acute.<sup>96</sup>

#### B. *Explaining the Changes*<sup>97</sup>

These findings reveal that although the Comprehensive Permit and Zoning Appeals Act itself has not been altered since it was passed in 1969, there have been significant changes in local responses to it and in the approaches and actions of state officials implementing the statute. The first two changes, in ZBA and HAC decisions, suggest that state and local actors have been “educated” by and made accommodations to each other. The other two changes, in the type and size of housing projects proposed and built, reveal the critical role played by changes in economic conditions, political regimes, and governmental programs and policies.

A dialectical process seems to have been played out in the actions and reactions of local and state officials. Over time, they have engaged in a give-and-take: after an initial period of almost unvarying and intense opposition, many—though by no means all—local communities have become more accepting of proposals for af-

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95. See *infra* tbls. 5 and 6 for data regarding the size of proposed and built chapter 40B housing projects.

96. See Bruce Butterfield, *Urgent Need for State Housing Aid Cited*, BOSTON GLOBE, Dec. 23, 1999, at D1. Joseph Kriesberg, Deputy Director of the Massachusetts Association of Community Development Corporations, in testimony at state budget hearings in December, 1999, said that “[t]he state is facing its most severe housing crunch in at least 12 years.” *Id.* He cited an estimate that 355,000 renter households in Massachusetts were paying more than 30% of their income for housing, which is the recommended federal guideline for the maximum income to rent ratio. *Id.*

97. The explanations offered in this section are generally based on what the Author gleaned from her many interviews with state and local officials. Since the interpretations and conclusions drawn are the Author’s alone, individual sources are not cited unless a specific quote or unique idea has been suggested.

fordable housing and have learned “to live with” and adapt to chapter 40B. State officials have learned that economic and political realities require them to allow local communities more leeway to use the law in ways that are more palatable to local officials and their constituents.

The decrease in ZBA denials of CP applications over time was probably influenced by a number of factors. However, the experiences communities had with the state appeals process seem likely to have played a major role. It could not have gone unnoticed for very long that applicants for CPs who received denials almost invariably brought an appeal to the HAC, and the HAC almost always overruled the local denial and ordered the granting of a CP.<sup>98</sup> Furthermore, the courts, to which a number of local communities brought appeals of HAC decisions, not only consistently upheld the HAC decisions, but also early on affirmed the constitutionality of the statute and further clarified and expanded its application.<sup>99</sup> Although some communities have continued to demonstrate that they would “rather fight than switch”<sup>100</sup>—and have continued to deny permits or grant them with conditions attached that would clearly make them “uneconomic” for the developer—most communities have been granting CPs with conditions that are intended to make the projects more acceptable to local sensibilities, for example, by specifying landscaping features, types of lighting, fencing, and parking locations.

When it became apparent to HAC officials, led by Maurice Corman, the first and long-time Chair and Counsel of the HAC, that overturning local decisions and ordering the granting of CPs did not often result in getting the housing in question built, a de-

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98. See Decision of the Pembroke Bd. of Appeals on the Appeal & Petition of the Pembroke Hous. Auth. 2 (Apr. 10, 1992) (granting a CP with conditions) (on file with author). After stating why it found the site inappropriate for a duplex house with two units of family housing, the Board wrote that it was granting the permit with conditions “because a denial of this application would probably be overturned.” *Id.* Other towns expressed the same awareness of the likelihood of the denial being overturned on appeal. See, e.g., Telephone Interview with Gary McCarthy, Town Clerk & Assistant Town Manager, Dracut, Mass. (May 28, 1997) (“If we turned them down, we felt the HAC would rule against the town no matter what and force us to take all proposals, so we tried to negotiate to decrease the size of the developments ourselves.”).

99. See Bd. of Appeals (Hanover) v. Hous. Appeals Comm., 294 N.E.2d 393, 407-10, 420 (Mass. 1973).

100. See DANIELSON, *supra* note 5, at 305 (borrowing this characterization from a cigarette ad popular in the 1970s).



cline in HAC overrulings occurred.<sup>101</sup> Some local communities had demonstrated that they could “lose the battle but win the war” by dragging out the proceedings through lengthy court appeals, which often resulted in developers either not being able to sustain the carrying costs over time or losing their land options or financing.<sup>102</sup> Realizing this, the HAC stepped up its efforts to encourage negotiations in order to reach compromises.<sup>103</sup> This change has paid off: more than half of all cases appealed to the HAC have resulted in affordable housing being built.

The significant shift from 40B housing proposed and built mainly for the elderly to a majority of the housing proposed and built for families reflects not only a conscious effort on the part of state housing administrators and policy-makers but also some important changes in the state’s economic context and in suburban housing markets in the 1980s. By the late 1970s, it was evident to state housing officials that a disproportionate amount of elderly housing, but very little family housing, had been built through chapter 40B.<sup>104</sup> The considerably higher rate of acceptance by local communities of proposals for housing for the elderly throughout the 1970s presumably reflected positive—or at least more benign—images of the elderly in contrast to images of the families they feared would occupy the “subsidized housing.” The elderly on fixed incomes have generally been viewed as “deserving” of assistance. In contrast to families, especially urban families of color, who may stereotypically be seen as living in problem-ridden public housing projects with large numbers of unruly children, elderly couples or individuals are not perceived by local residents as a threat to their way of life or as a big drain on local services, such as education.<sup>105</sup>

Soon after Byron Matthews became head of the Department of Community Affairs in 1978, he and Joseph Flatley, who moved

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101. See Krefetz, *supra* note 36, at 293 (citing an interview with Maurice Corman).

102. See DANIELSON, *supra* note 5, at 165 (“Local governments . . . bring substantial staying power to zoning and housing contests in court, which provides them with a considerable advantage over adversaries who rarely can afford protracted delays.”).

103. See Interview with Jane Wells, *supra* note 83 (noting the encouragement of use of the state’s mediation services, which were used in 30 to 35 cases, and indicating that in about 85% of those a settlement was reached).

104. See Interview with Joseph Flatley, in Boston, Mass. (Mar. 27, 1997).

105. See Calvin Trillin, *U.S. Journal: Mt. Laurel, N.J.*, THE NEW YORKER, Feb. 2, 1976, at 71 (commenting on the predilection for elderly housing in the aftermath of the *Mount Laurel I* ruling). Specifically, Mr. Trillin wryly remarked that “old people as a rule are not dangerous. They do not, as a rule, produce children.” *Id.*

to that agency from the Office of State Planning, proposed a requirement that at least 20% of the units in new elderly housing projects be designated for family housing. While this requirement apparently did not get formalized, state officials increasingly began pushing for family housing in the early 1980s.<sup>106</sup> More aggressive actions aimed at producing family housing were undertaken beginning in 1983, after Michael Dukakis regained the governor's office. With the economy booming and housing prices starting to skyrocket, the Dukakis Administration seized the opportunity to build political support for new state housing programs in order to fill the void created by the federal government's retreat. This retreat began in 1973 with President Nixon's moratorium on federal funds for new subsidized housing construction and continued through the 1980s with congressional cutbacks to the section 8 New Construction program.<sup>107</sup>

With more and more young families priced out of the homeownership market and rental property vacancy rates low, the politically savvy, low- and moderate-income housing production-oriented individuals in the Dukakis Administration moved into high gear to advance new programs that were rationalized as essential for maintaining the "Massachusetts Miracle."<sup>108</sup> They made their case by arguing that the state needed to address the "affordable housing crisis" *for families* in order to attract and retain industry.<sup>109</sup>

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106. Interview with Joseph Flatley, *supra* note 104. It was not until 1990, with the creation of the Local Initiative Program that a formal limit on elderly housing was established, and then only for LIPs. MASS. REGS. CODE tit. 760, § 45.07(2) (1996). See also *supra* note 49 for a brief discussion of the Local Initiative Program. The regulations for that program provide that since "[t]he most critical needs in the Commonwealth are for family and special needs housing" a project proposal will not be approved by the state if it would result in more than 5% of the town's housing stock being subsidized elderly housing, unless special circumstances warrant an exception. § 45.07-.07(2).

107. From 1981 to 1987, federal housing subsidy program support decreased by 75%, from \$32 billion to less than \$8 billion. BLUE RIBBON COMM'N, STATE OF CONN., HOUSING REPORT 3 (1989).

108. "The Massachusetts Miracle" was the phrase Governor Dukakis used to describe the significant growth in industry and construction that the state experienced in the mid-1980s. See Bruce Mohl, *Dukakis Concedes 'Miracle' is Gone*, BOSTON GLOBE, Nov. 15, 1989, at 1, available at 1989 WL 4836880. In his presidential campaign, Dukakis frequently referred to this "miracle" in economic growth. See *id.*

109. Michael Brown analyzed the change from making the case for affordable housing on social justice grounds to economic prosperity grounds in his paper for the Author's Housing Policy seminar at Clark University in 1988. Michael Brown, Opening up the Suburbs from Within: An Updated Review of the Massachusetts Anti-Snob Zoning Law (Apr. 28, 1988) (unpublished paper, on file with author). The economic prosperity argument was also used explicitly by affordable housing advocates who pushed

This re-definition of the problem and the new rhetoric (the terms "subsidized housing" and "low- and moderate-income housing" virtually vanished in the mid-1980s) garnered considerable support from the Massachusetts legislature for the creation of several important new housing production programs. The first of these programs, a subsidy program for the construction of rental housing, the State Housing Assistance for Rental Production program ("SHARP"), was passed in 1983.<sup>110</sup> The Tax Exempt Loans to Encourage Rental Production ("TELLER") program was created in 1985,<sup>111</sup> and the Rental Housing Development Action Loan ("R-DAL") program was established in 1987.<sup>112</sup>

Among these new state housing programs was the Homeownership Opportunity Program ("HOP"), which was created in 1986.<sup>113</sup> This program was especially significant in the evolution of the Massachusetts Comprehensive Permit law.<sup>114</sup> The HOP program, which provided low-interest mortgages to qualified first-time homebuyers, was expected to be appealing to suburban communities since it addressed the needs of a "deserving" population of young families, many of whom were likely to have been suburban-born and bred, and it supported homeownership instead of rental housing. Nevertheless, and ironically, since HOP was overseen by the Massachusetts Housing Partnership,<sup>115</sup> HOP proposals triggered intense conflicts and a firestorm of outrage in a number of communities. As one state official put it, "HOPs didn't just ruffle

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for passage of the chapter 40B-like Connecticut legislation in the late 1980s. See BLUE RIBBON COMM'N, *supra* note 107. The co-chairs of the Connecticut Blue Ribbon Commission on Housing, John F. Papandrea and Arthur T. Anderson, wrote in their February 1, 1989 letter to the Governor and legislative leaders and accompanying the Commission's Report: "[T]hroughout the period of our deliberations, the housing crisis continued to threaten the welfare of our citizens and *the economic prosperity of our business community.*" *Id.* (emphasis added).

110. 1983 Mass. Acts 574 (codified as amended in MASS. GEN. LAWS ch. 23B, §§ 25-27 (1998)).

111. 1984 Mass. Acts 233 (codified as amended at MASS. GEN. LAWS ch. 121B, § 26(m) (1998)).

112. 1987 Mass. Acts 226. SHARP, TELLER, and R-DAL are detailed in chapter 760, sections 21 and 490 of the 2000 Massachusetts Regulations Code.

113. 1985 Mass. Acts 405 (creating the Massachusetts Housing Partnership Fund which later developed programs such as HOP).

114. See *id.* (noting one of the purposes of the fund was to provide housing for "low and moderate income households").

115. The Massachusetts Housing Partnership was created in 1985 to encourage and coordinate cooperative efforts between state agencies, local communities, and developers. Philip B. Herr, *Partners in Housing: The Massachusetts Experience*, 5 J. REAL EST. DEV. 7, 8-9 (1989).

feathers, they stripped the bird.”<sup>116</sup>

A backlash against chapter 40B was triggered by HOP proposals primarily from a small number of developers new to the chapter 40B process who were eager to build market-rate housing, but willing to build some affordable units through the HOP program because it gave them entry to towns that were “ripe for development” but resistant to growth.<sup>117</sup> Local officials perceived such developers as using the CP process “like a club” and “shoving the housing down their throats,”<sup>118</sup> because they proposed large-scale developments (and sometimes condominium developments rather than single family homes) of several hundred units, providing only the minimum number of 25% or 30% of the units for subsidized HOP mortgage homebuyers.

These new state housing programs and a hot housing market for private developers did indeed produce a dramatic increase in CP proposals in the last five years of the 1980s. Between 1985 and 1989, 263 CP applications were submitted to ZBAs, (over 40% of the total over the 30-year period), and HOP alone accounted for about 100 of these. Many of these proposals did result in the creation of affordable housing, including both rental housing and single-family homes. However, this extraordinary level of activity also produced an intense political reaction, which when combined with changing economic conditions created a whole new era for chapter 40B. In this new era there has been a re-assertion of local influence, a decline in state government activism in the affordable housing arena, and a sharp reduction in the amount of chapter 40B activity and in the building of affordable housing.

Although state housing officials tried to assure incensed local officials who felt abused by chapter 40B, that the state would act to

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116. Telephone Interview with Katherine Racer, the state official who oversaw HOP for the EOCD (Mar. 25, 1997).

117. Interview with Clark Ziegler, Executive Director, Massachusetts Housing Partnership (former Deputy Director of EOCD from 1985-1990), in Boston, Mass. (Mar. 4, 1997). Ziegler suggested that in the earlier period, a small number of developers, non-profit organizations, local housing authorities, and limited dividend developers mainly did chapter 40B housing and worked closely with EOCD. *Id.* But with the housing boom and the creation of HOP, a lot of new players who had not used the CP process before wanted into the action and “didn’t play by the rules.” *Id.*

118. These terms were used by several local officials in describing how they viewed developers’ use of chapter 40B in the mid-to-late 1980s. Similar views were expressed by Mary Padula, Secretary, EOCD/DHCD (1991-1996), during an interview in Lunenburg, Mass. on Feb. 13, 1997. Ms. Padula noted that in many cases the developers “didn’t give a damn about the people, they just wanted to make money without worrying about the impact on the town.”

prevent the Act from being used irresponsibly,<sup>119</sup> some aggrieved parties took their wrath and indignation to the state legislature. During the 1987 legislative session, 24 bills attacking chapter 40B were filed by suburban representatives.<sup>120</sup> The petitions included proposals that ranged from reducing the 10% standard, to placing a one-year moratorium on the CP process, to repealing the law entirely.<sup>121</sup> While the Governor and the legislative leadership succeeded in preventing any of these bills from advancing, they agreed that the time had come to conduct a formal public investigation of the law's working and evaluate its effectiveness.<sup>122</sup>

In the spring of 1988 the Governor and the Legislature appointed the members of The Special Commission Relative to the Implementation of Low and Moderate Income Housing Provisions ("Grace Commission").<sup>123</sup> After holding hearings throughout the state, the Grace Commission issued its report in the spring of 1989.<sup>124</sup> The report, which significantly received the unanimous support of all Commission members and was accepted by the Massachusetts Legislature, summarized the testimony it had heard as "[o]verall . . . very positive" and observed that "[m]ost everyone agreed that without c.774 [40B] there would be no affordable housing production in the Commonwealth and that efforts to weaken

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119. See, e.g., Letter from Amy S. Anthony, Secretary, EOCD, to local officials (Aug. 19, 1987) (on file with author).

120. GRACE COMM'N REPORT, *supra* note 45, at 11.

121. *Id.* at 11-12.

122. *Id.* According to former Representative Augusto F. Grace, when he came into the legislature in 1987 (serving as one of a small number of African-Americans in the House, and the only African-American representative from a suburban district), it was clear to him that chapter 40B could end up being repealed or gutted unless there was some easing up of chapter 40B pressures on suburbs, like his town of Burlington and its neighboring communities, that were feeling overrun with multiple proposals for large-scale developments. Interview with Augusto F. Grace, Representative, Massachusetts House of Representatives, in Fitchburg, Mass. (Feb. 28, 1997). Grace convinced the co-chairs of the Joint Committee on Housing and Urban Development, Representative Kevin W. Fitzgerald and Senator Frederick E. Berry, to create a commission to review the Act. *Id.* He also met with Governor Dukakis and EOCD Secretary Amy Anthony to assure them that his intention was to save chapter 40B, not to kill it. *Id.* Grace then worked with the House and Senate leadership to select the members of the Commission and lobbied them to appoint him as the Commission's co-chair along with Senator Berry. *Id.*

123. The Commission became known as the Grace Commission due to the last name of its co-chair, Augusto Grace. GRACE COMM'N REPORT, *supra* note 45, at 11-15 (noting that the Grace Commission was created in chapter 4 of the Massachusetts Acts Resolves of 1987, along with the rest of the Commission's history).

124. See generally *id.* (providing the purpose and history behind the Commission along with the Commission's findings).

the law should be discouraged.”<sup>125</sup> The Commission acknowledged, however, that some local concerns about the law were valid and modifications to improve its implementation were warranted in order to get more affordable housing built “in all communities . . . while respecting the individual needs of each community.”<sup>126</sup> It is important to note that by the time the Grace Commission report was issued, the furor over CPs and HOP had cooled, as activity had slowed down greatly—the Massachusetts Miracle was over, the economy had gone south and the state budget was in the red.<sup>127</sup>

The major change recommended by the Grace Commission, promulgated in the Administrative Regulations in 1990, was to allow municipalities to count toward the 10% threshold “local housing initiatives” that do not involve a federal or state subsidy but are made viable by, for example, the town donating land to a developer, or by town officials easing the way for the construction of a conventionally-financed mixed-income project.<sup>128</sup>

The state budget crisis helped elect fiscal conservative, laid-back, Republican William Weld Governor in 1990. Weld’s election resulted in a significant shift in the state’s top-level housing agency personnel, programs, and approach. With former state legislator and long-time local government official Mary Padula (from the small town, and emerging suburb, of Lunenburg) installed as head of EOCD,<sup>129</sup> the agency moved away from actively promoting housing development and assumed a “service provision” role for

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125. *Id.* at 20.

126. *Id.* at 28.

127. See N.Y. TIMES, Aug. 9, 1990, at B2, available at LEXIS, News Library, Nytimes file. By 1990, Massachusetts was increasingly being referred to as “Taxachusetts,” and state taxes that year were raised by an increase greater than all other states except New Jersey. See, e.g., Mohl, *supra* note 108, at 1.

128. See GRACE COMM’N REPORT, *supra* note 45, at 24. Another major recommendation was the creation of a process whereby communities that establish and receive EOCD certification for a local Housing Development Action Plan that describes how and when they will meet their affordable housing needs, will be able to deny CP applications. *Id.* As long as the communities are meeting their timetables, HAC will presume such denials to be legitimately based on the proposal in question being “inconsistent with local needs.” *Id.* at 25. This process is similar to the New Jersey Council on Affordable Housing’s certification provisions. See Payne, *supra* note 7 (manuscript at 4). This process was approved and included in the Regulations. See MASS. REGS. CODE tit. 760, § 46.04-.13 (1993) (withdrawn 1996). However, the certification process was not promoted or fully implemented; and only one community ever submitted a housing plan. The certification option was apparently lost in the shuffle of the change of political administrations in 1991, and it was subsequently removed from the regulations.

129. The EOCD was soon re-named the Department of Housing and Community Development (“DHCD”), after having nearly been eliminated altogether.

local communities. Major budget cuts were made to state housing programs, and HOP funds were eliminated altogether.

While the provisions of the Local Initiative Program (“LIP”) were worked out by housing officials in the Dukakis Administration, the program survived the transition to the Weld-Cellucci Administration’s takeover of the state’s Executive Offices. The LIP has, effectively, become the major affordable housing initiative of DHCD in the 1990s. The underlying idea of this program—that the local community should shape affordable-housing proposals rather than having them imposed by “outsiders”<sup>130</sup>—is, indeed, consistent with the orientation of the current administration; so are its key features: the government “subsidy” for the project is technical assistance provided to the town by DHCD, the CP process can be used for LIPs, but *only* if the local executive (typically the Board of Selectmen) first approves the proposal, and LIPs allow a local preference for 70% of the units.<sup>131</sup> The creation of this program has heralded what this Author terms “The Quiet Counter-Revolution” of re-asserted local control in chapter 40B’s evolution.<sup>132</sup>

To a large extent, LIPs have been responsible for the significant decrease in the size of chapter 40B projects proposed and built in the 1990s. Nearly half of all the CPs proposed in the 1990s were LIPs (82 out of 175).<sup>133</sup> The majority of LIPs have had less than 25 units, and the largest LIP has been for 100 units. Since nearly all LIPs have been proposed by private developers using the “internal subsidy” from the market rate units to create the affordable units, and they have for the most part set aside the minimum percentage required for affordable units (i.e., 25%),<sup>134</sup> their small size means that they increase only *minimally* the supply of affordable housing in a community—they are typically producing only about 6 to 8 units of affordable housing per project.

It is also important to note that approximately 90% of the LIP projects have been for single-family homes, with the affordable houses reserved for moderate-income households with incomes at the top of the allowable range—80% of the area’s median income—and that LIPs allow a 70% local preference for the units.

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130. See LIP GUIDELINES, *supra* note 49.

131. See *id.* at 2, 7, 11.

132. See *supra* note 89 for a discussion of the “Quiet Revolution” whereby some states have reasserted their authority over local decisions.

133. As of June, 1999, 103 LIPs had been proposed in 73 communities, but not all of these used the CP process.

134. See LIP GUIDELINES, *supra* note 49, at 5.

Thus, it is clear that LIPs are a very weak tool for addressing the need to significantly increase the supply of affordable housing, much less the mobility goal of “opening up” opportunities for lower income, largely minority, city dwellers to move to the suburbs.<sup>135</sup> While LIPs require an Affirmative Marketing Plan and are supposed to have a minority set-aside requirement of 10-15% of the units, no aggressive outreach to attract urban minority families has been done and there has been little, if any, monitoring of the outcomes of the plans.<sup>136</sup>

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135. The extent to which chapter 40B housing units built in the suburbs have, overall, resulted in movement into the suburbs by lower-income city dwellers, and racial minorities in particular, is not ascertainable because systematic records on the characteristics of all the projects' occupants are not kept by any state agency. Also, local officials are generally not able (or willing) to provide information on the previous place of residence or the racial characteristics of the occupants (current or past, where turnover in the units has occurred) of chapter 40B housing in their communities. Given that the majority of the chapter 40B units built in the 1970s and in the first half of the 1980s were for the elderly, the occupants were likely to have been overwhelmingly white and to have previously resided in the same community or in one nearby. Over the past fifteen years, as more family housing has been built, it is possible that some increased movement to the suburbs by urban, non-white households has occurred. However, it is also possible that, even without LIP's 70% local preference, the occupants of the family housing are disproportionately white households who previously resided in the suburbs rather than movers from the cities. An early study of the occupants of the “Mount Laurel housing” found that there was far less movement to the suburbs by urban, lower-income minority families than had been expected. See Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1256-58 (1989). A more recent study of the occupants of housing built through the Fair Housing Act in New Jersey also found little movement to suburban housing by urban Black and Latino households. See Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1302-03 (1997).

136. LIP projects—and all other affordable housing projects that receive federal and state subsidies in the Boston area—are supposed to be reported to the Boston Clearinghouse-Metrolist. This Clearinghouse was set up in 1991 after the consent decree from the suit brought by the NAACP charging a pattern of racial segregation in Boston's public housing. *NAACP v. Boston Hous. Auth.*, 723 F. Supp. 1554 (D. Mass. 1989). The Clearinghouse provides information on affordable housing in all 106 communities in the Boston MSA to minority and other residents of Boston. See Telephone Interview with Marlene Richardson, Staff Member, Boston Clearinghouse Metrolist (July 30, 1997). Between 1992 and 1997, the Clearinghouse served about 5000 families; about 20% of these (i.e., about 1000 households) found housing through its services, and of these, about 30%, or approximately 300 families, located housing outside the city of Boston—though not all of these families were minorities and not all of the housing they moved to were subsidized units. *Id.* The lack of monitoring is by no means unusual. Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, CITYSCAPE: JOURNAL POL'Y DEV. & RES. No.3, 1999, at 171, 175 (“HUD has been egregiously derelict in enforcing the Affirmative Fair Housing Marketing Plans required in its own programs.”).



It is also worth noting that few communities have actually initiated LIP projects; the vast majority, around 75%, have been proposed by developers.<sup>137</sup> Furthermore, the “local subsidy” most commonly provided for LIPs has simply been the approval of the local executive, and not the donation of land or funds of any sort.<sup>138</sup> Also, some town officials see the state “subsidy” of technical assistance as a burden, lengthening and complicating the process.<sup>139</sup>

There has been increased recognition and acceptance by some local officials of the need for more affordable housing to address local needs of “deserving” families, including town employees and young families raised in the town, but now priced out of its housing market. However, putting together housing proposals is still a daunting process for officials. Moreover, competing priorities for funding from local budgets, heavy reliance on local property taxes to fund services—especially education, whose costs typically account for more than half of suburban government expenditures<sup>140</sup>—and a small to non-existent local political constituency for affordable housing, make it unlikely that many communities will become more aggressive and initiate LIP projects. So private de-

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137. Interview with Bert Rodiger, former Assistant Director, Private Housing Division, Department of Housing and Community Development, in Boston, Mass. (Feb. 7, 1997) (estimating the number of projects proposed by developers).

138. *Id.*

139. Letter from Lesley Eaton, Administrative Assistant, Zoning Board of Appeals, West Tisbury, Mass., to Sharon Perlman Krefetz (Mar. 10, 1997) (on file with author):

[T]he West Tisbury ZBA's single Comprehensive Permit enabled only four units of affordable housing to be built. It was a lengthy, complicated process, the end result being an attractive, well-built affordable housing project, but only touching the tip of the iceberg when it comes to trying to provide affordable year-round housing for the residents of West Tisbury and the island in general. . . . [Comprehensive Permits] do not always work well, especially for small projects, because of massive amounts of paperwork between the state, the developer, and the town and the time and money spent trying to process this paperwork.

*Id.*

140. The role of property tax reliance in providing a very strong incentive for suburbs to engage in exclusionary zoning has long been recognized. See RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING* 3 (1973); DANIELSON, *supra* note 5, at 43-47; ROBERT WOOD, *SUBURBIA: ITS PEOPLE AND THEIR POLITICS* 217 (1958). Long before property tax limitation measures such as Proposition 13 in California or Proposition 2½ in Massachusetts were passed and exacerbated the situation, Wood, using overstated terms drove home the message about disincentives to “open up”: “[G]iven the nature of the property tax, it is difficult to criticize suburban officials . . . for exploiting their position. To do otherwise when government costs are rising steadily . . . to strive for heterogeneous neighborhoods, to welcome citizens regardless of race, creed, or color—is to invite financial disaster.” *Id.*

velopers are likely, when and where the market conditions are attractive to them, to be the lead players in LIPs and, with rare exceptions, they will not be looking to serve lower income or minority households, but to secure the highest possible rate of return on their investments. Local officials who support LIP proposals will, for the most part, be inclined to ensure that the projects are relatively small so that they do not cause major strains on local infrastructures or protests from local residents who find large developments offensive.<sup>141</sup> They will also, for understandable reasons, typically want to make sure that the housing built serves their “deserving” local families, especially as the price of housing in many suburbs becomes increasingly out of reach for many middle-income young families.<sup>142</sup>

Another potentially important means of stimulating chapter 40B affordable housing activity by developers, which ensures that local concerns and priorities will shape the proposals, was established by a recent decision of the Housing Appeals Committee. In *Stuborn Ltd. Partnership v. Barnstable Zoning Board of Appeals*,<sup>143</sup> the HAC held that a developer who receives loans from the New England Fund of the Federal Home Loan Bank of Boston has a public subsidy. The developer can qualify as a limited dividend organization eligible to use the CP process if, in addition to setting aside at least 25% of the units for affordable housing (for families with incomes at or less than 80% of the median income), the developer enters into a regulatory agreement limiting its profits and accepts deed restrictions and other terms similar to those for LIPs.<sup>144</sup> The language in this HAC decision emphasizes and hails the asser-

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141. Several instances in which the local executive body, i.e., the Board of Selectmen, refused to support a LIP proposal, or initially gave its support but then withdrew it, involved concerns about the relatively large size of the project and/or intense opposition by neighbors of the site. See *Welch v. Easton Bd. of Appeals*, No. 94-06 (Mass. Housing App. Committee Feb. 28, 1995), available at Nellco, *supra* note 81; *Johnson v. Wareham Bd. of Appeals*, No. 92-05 (Mass. Housing App. Committee Oct. 13, 1993), available at Nellco, *supra* note 81; *Little Hios Hills Realty v. Plymouth Bd. of Appeals*, No. 92-02 (Mass. Housing App. Committee Sept. 23, 1993), available at Nellco, *supra* note 81.

142. See DANIELSON, *supra* note 5, at 353-54 (“[T]here is certain to be substantial demand for subsidized units from within suburbia given demographic changes and rising housing costs.”). Local control and “responsiveness to majority interests,” Danielson predicted, would result primarily in “opening the suburbs for suburbanites.” See *id.* at 356.

143. No. 98-01 (Mass. Housing App. Committee Mar. 5, 1999), available at Nellco, *supra* note 81.

144. See *id.* at 3.

tion of local control and the ability of local communities to shape affordable housing developments:

In the past, large grants or loans that constituted significant proportions of total development costs were provided . . . under a “command and control” model. . . . [S]tate or federal officials . . . retained considerable control over the design and operation of the housing. Today, however, there has been a significant shift throughout government toward market-driven approaches. . . . [The NEF] will empower [towns] to make more decisions about the affordable housing that is built within their boundaries, and so increase local control over the process.<sup>145</sup>

This brings us back to the role of the state and federal governments. A slight majority of the projects built through the CP process in the 1990s (57 of 103) were built by private developers who received funding from an MHFA multi-family rental construction program (primarily the 80/20 program) or who used the federal Low Income Housing Tax Credit (LIHTC) program, which since its passage by Congress in 1986 has become the primary federal subsidy for the creation of affordable housing. If not for these programs, which are targeted at lower-income households,<sup>146</sup> nearly all the affordable housing built through chapter 40B in the 1990s would have been single-family homes for moderate-income families, and the total number of affordable units built would have been only about 500-600 instead of several thousand. One promising recent development with respect to increasing the supply of housing for lower-income households is the creation of a new state Low Income Housing Tax Credit program, which will provide up to \$4 million per year in tax credits in each of the next five years.<sup>147</sup> “Opening up” for minority households could be increased by heed-

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145. *Id.* at 7-8. The author of this significant decision, HAC Chair Werner Lohe, has since elaborated on this theme of moving away from the “command and control” model and toward local “empowerment.” See Werner Lohe, *Command and Control to Local Control: The Environmental Agenda and the Comprehensive Permit Law*, 22 W. NEW ENG. L. REV. (forthcoming 2001); HAC Chair Werner Lohe, Address at Western New England College School of Law Conference on Increasing Affordable Housing and Regional Housing Opportunity in Three New England States and New Jersey (Dec. 10, 1999); see also HAC Chair Werner Lohe, Address at the CHAPA Conference in Celebration of the 30th Anniversary of Chapter 40B (Oct. 21, 1999).

146. These programs require reserving at least 20% of the units for households with incomes 50% or less than the area’s median income or 40% for people with incomes 60% or less than the median. See, e.g., *Stuborn Ltd. P’ship v. Barnstable Bd. of Appeals*, No. 98-01 (Mass. Housing App. Committee Mar. 5, 1999), available at Nellco, *supra* note 81.

147. *Tax Credits for Affordable Housing*, BOSTON GLOBE, Nov. 20, 1999, at E1.

ing Professor Roisman's recommendation that these much in demand tax credits carry with them the requirement of racial and economic integration.<sup>148</sup>

#### CONCLUSIONS AND DIRECTIONS FOR FUTURE RESEARCH

Thirty years of experience with the Massachusetts Comprehensive Zoning and Land Use Appeals Act suggests that the statute has had some notable successes in getting affordable housing built in many communities throughout the state, outside the central cities. The Act has, therefore, contributed in important ways to increasing housing mobility opportunities for some households. The accomplishments of chapter 40B are impressive, but so are its limitations. Chapter 40B has not produced anywhere near the amount of affordable housing that is needed, nor has it overcome all the obstacles to "opening up the suburbs." It has created small toe-holds, but the walls of suburban exclusion remain high.

It is beyond the scope of this article to analyze all the limitations of the Massachusetts statute; these have been noted in other studies.<sup>149</sup> It is, however, appropriate to conclude by suggesting the most fundamental problems that need to be addressed if the statute is to become more effective in achieving its goals.

One clear lesson from this examination of the evolution of chapter 40B is that local political and economic realities need to be recognized and addressed. Little or no constituency pressure will be put on local governments to create housing for low-income people as long as few low-income citizens live within their borders and local property taxes are relied upon to subsidize the creation of the housing, infrastructure, and services needed for its residents. Local property taxes are a very problematic basis for effecting equity and redistributive justice, as has been recognized in school financing reform cases.<sup>150</sup> In Massachusetts, where Proposition 2½ constrains

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148. See Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. (forthcoming 2001).

149. Krefetz, *supra* note 36; Reed, *supra* note 18; Stockman, *supra* note 18; Vaughn, *supra* note 18; Johnston, *supra* note 18; Krefetz, *supra* note 15; Verrilli, *supra* note 51. Among the most serious limitations are the law's passive approach and dependence on developers' choices of locations, which have produced uneven results, and the ability of local actors to create costly delays that can prevent projects from getting built.

150. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (involving a successful challenge to heavy reliance on property taxes to finance education); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (same). Working out alternative means of financing local education has generally not been done readily by state legislatures. See HELEN F. LADD ET AL., *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*

annual increases in property taxes, unless an override is approved by local referendum,<sup>151</sup> the impact of additional school-aged children on taxes is a source of considerable concern to local officials. Therefore, as Professor Stonefield has correctly observed, “simply removing barriers is not enough.”<sup>152</sup> State and federal actions and funding programs need to be expanded, including more direct subsidies for the construction of low-income housing<sup>153</sup> and offsetting funds for services, which could come in the form of additional local aid to towns that encourage, or at least approve, proposals for such housing.<sup>154</sup> Incentives for communities to “do the right thing” are needed.<sup>155</sup>

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(1999) (reviewing the history, politics, and consequences of school finance reform); see also SHARON PERLMAN KREFETZ, WELFARE POLICY MAKING AND CITY POLITICS 199 (1976); Krefetz, *supra* note 36, at 295.

151. MASS. GEN. LAWS ch. 59, § 21c (1998). Proposition 2½ was passed in a voter referendum in November, 1980 and took effect in 1981. It sets a two-fold limitation: the total tax assessment each year may not exceed 2.5% of a community’s “full and fair” property valuation, and the increase in the annual tax levy may not be more than 2.5%. *Id.*

152. Stonefield, *supra* note 2.

153. There has been a pronounced trend in the opposite direction in Massachusetts over the past decade; state funds to support housing have decreased from \$220 million in 1990 to \$137.5 million in fiscal 2000. Brian C. Mooney, *Opening a Door for the Have-Nots: Grass-Roots Group Seeks More Subsidized Housing*, BOSTON GLOBE, Dec. 25, 1999, at B1.

154. For a brief period in the 1980s, EOCD Secretary Amy Anthony and state Finance and Administration chief Frank Keefe were able to put a factor weighing affordable housing into the state’s local aid formula. See Interview with Amy Anthony, Secretary, EOCD, in Boston, Mass. (Mar. 13, 1997). The state budget crunch and change in political leadership apparently resulted in the demise of this consideration.

Professor Roisman also suggests that “suburban jurisdictions that include subsidized housing should receive additional compensatory benefits” and cites Anthony Downs’ list of costs that the federal or state government should bear or provide. See Roisman, *supra* note 148.

155. It should be noted that the “stick approach” was tried in Massachusetts in the 1980s with mixed results. In 1982, at the behest of EOCD Secretary Byron Matthews and his assistant, Joe Flatley, Governor Ed King issued Executive Order 215, which directed all state agencies administering discretionary development-related assistance programs to withhold them from communities “which have been determined to be unreasonably restrictive of new housing growth.” See EXEC. OFFICE OF CMTY. DEV., LOCAL HOUSING POLICIES AND STATE DEVELOPMENT ASSISTANCE: A GUIDE TO EXECUTIVE ORDER 215 (1982). The Secretary of EOCD was authorized to make the determination, and among the assistance programs identified were several of special interest to suburbs, for example, grants for open space and recreation, for conservation land, and for sewer and water systems. *Id.* As Secretary of EOCD from 1983 to 1990, Amy Anthony used the order selectively, holding up funds in 5 or 6 cases to “send the message” that the state was serious about getting affordable housing built and putting another 50 communities on notice that they would not receive funds if they did not make more of an effort in the affordable housing area. Interview with Amy Anthony, *supra* note 154. While some of those put on notice did become more receptive to chap-

As Professor Roisman has eloquently argued, the case needs to be made to and by political leaders at the state and national level, that the sustainability of suburbs as well as cities—indeed, the sustainability of our nation—depends on the federal government and the states taking aggressive actions to address both economic and racial segregation in metropolitan areas.<sup>156</sup> Professor Roisman is also surely correct in suggesting that “[w]e need leaders who will speak directly and forthrightly to the necessity of racial desegregation.”<sup>157</sup> Furthermore, if more than lip service is to be paid to achieving the goals of an integrated society and “a decent home and a suitable living environment” for all Americans,<sup>158</sup> much more than the important but limited tool of the Comprehensive Permit and Zoning Appeals Act will need to be in the architects’ and artisans’ tool kits.

Further research is needed to provide answers to some of the most important questions that this and other studies of chapter 40B have not been able to address. These critical “so what” questions include:

- Who has benefited, and in what ways, from the affordable housing that has been built with a Comprehensive Permit? What are

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ter 40B proposals or developed a housing program, others became more resentful of the statute and helped lead the attack on it in the legislature in 1987-1988. Executive Order 215 has not been invoked since January, 1991, when the Republican Administration came on board. Mary Padula, the EOCD/DHCD Secretary from 1991 to 1996, said she thought it was “unfair to use such a stick to penalize communities.” See Interview with Mary Padula, Secretary, *supra* note 118.

It is interesting to note that three of the quite affluent communities that had funds withheld in the 1980s and were willing to forego state assistance to remain exclusive at that time, namely, Weston, Hamilton, and Topsfield, had LIP projects built in the 1990s. Apparently the greater local control and small scale of the developments involved (6 or 7 affordable units), coupled with the 70% local preference for occupants, has helped turn around some of the resistance.

156. Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 112-18 (1998); see also Orlando Patterson, *What to Do When Busing Becomes Irrelevant*, N.Y. TIMES, July 18, 1999, at 17 (making a compelling case for the importance of addressing racial segregation through housing in his analysis of the recent abandonment of busing to achieve racial integration in the Boston public schools). Patterson suggests that “[h]aving abandoned busing we should now turn to the underlying problem that made it necessary in the first place: residential segregation.” *Id.* The author also argues that “the integration of our neighborhoods. . . will not only solve the educational problems of our minorities . . . but [will] also make for a more tolerant and genuinely multi-ethnic nation.” *Id.*

157. Roisman, *supra* note 136.

158. Housing Act of 1949, 42 U.S.C. § 1441 (1994) (stating this oft-quoted, long-standing goal for federal housing policy).

the characteristics of the occupants of this housing, their race, gender, age, family status, and previous place of residence (city or suburb)? What impact has the move to chapter 40B housing had on the occupants' lives? How has it affected their employment, income, and the educational outcomes and employment of their children?<sup>159</sup>

- What effects have chapter 40B affordable-housing projects had on the communities in which they have been built? Have attitudes of community residents changed? Is there support for the "contact hypothesis"?<sup>160</sup> Have neighbors who were opposed to the housing become more tolerant and accepting of "others"? Have property values in the neighborhood been affected, and if so, how?<sup>161</sup> Have local schools and town budgets been appreciably affected?

Studies addressing these questions, as well as the other crucial question of what explains the variations in local communities' acceptance of, or opposition to, proposals for affordable housing, would be most instructive. Comparative research examining these questions in Connecticut and Rhode Island, with their chapter 40B-like policies, as well as in Massachusetts, would be most fruitful. The

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159. Rosenbaum's important longitudinal studies of these outcomes for the lower-income African-American families who moved to the suburbs as part of the *Gautreaux* mobility program found that the educational attainment and employment of the children improved and the mothers were more likely to have jobs and be less dependent on public assistance. James E. Rosenbaum & Shazia Rafiullah Miller, *Certifications and Warranties: Keys to Effective Residential Mobility Programs*, 27 SETON HALL L. REV. 1426, 1428-39 (1997); James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1521-41 (1993). The *Gautreaux* mobility program began in the aftermath of two cases in which the courts found intentional segregation in public housing; one case was filed against HUD and the other was filed against the Chicago Housing Authority. *Gautreaux v. Romney*, 448 F.2d 731, 732 (7th Cir. 1971) (HUD); *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 908 (N.D. Ill. 1969).

160. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 261-81 (1954) (proposing that racial and other intergroup prejudice can be reduced and tolerance increased by bringing members of different groups into "contact" with each other under certain conditions); Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCHOL. 65, 66 (1998) (using Allport's "intergroup contact" hypothesis).

161. See THE INNOVATIVE HOUS. INST., *THE HOUSE NEXT DOOR* (1998), <http://www.Inhousing.Org/TheHouseNextDoor/Part I> (last revised Feb. 7, 2001) (on file with the Western New England Law Review). A study by the Innovative Housing Institute of the resale prices of more than 1000 dwellings sold between 1992 and 1996 in or near fourteen subdivisions with subsidized housing units in Montgomery County, Maryland, and Fairfax County, Virginia, found, overall, "no significant difference in price trends" between nonsubsidized homes in or near the subdivisions and the market as a whole. *Id.*

Western New England College School of Law Conference on Increasing Affordable Housing and Regional Housing Opportunity and this issue of the Law Review demonstrate the value of such comparative research by scholars. States must take the crucial next step. Systematic records should be kept of all proposals for affordable housing made in local communities using their provisions, the local responses to them, whether the housing ultimately gets built or not, and who occupies it. Such data is essential in order to enable assessments to be made of the full impact of these statutes in relation to their goals.



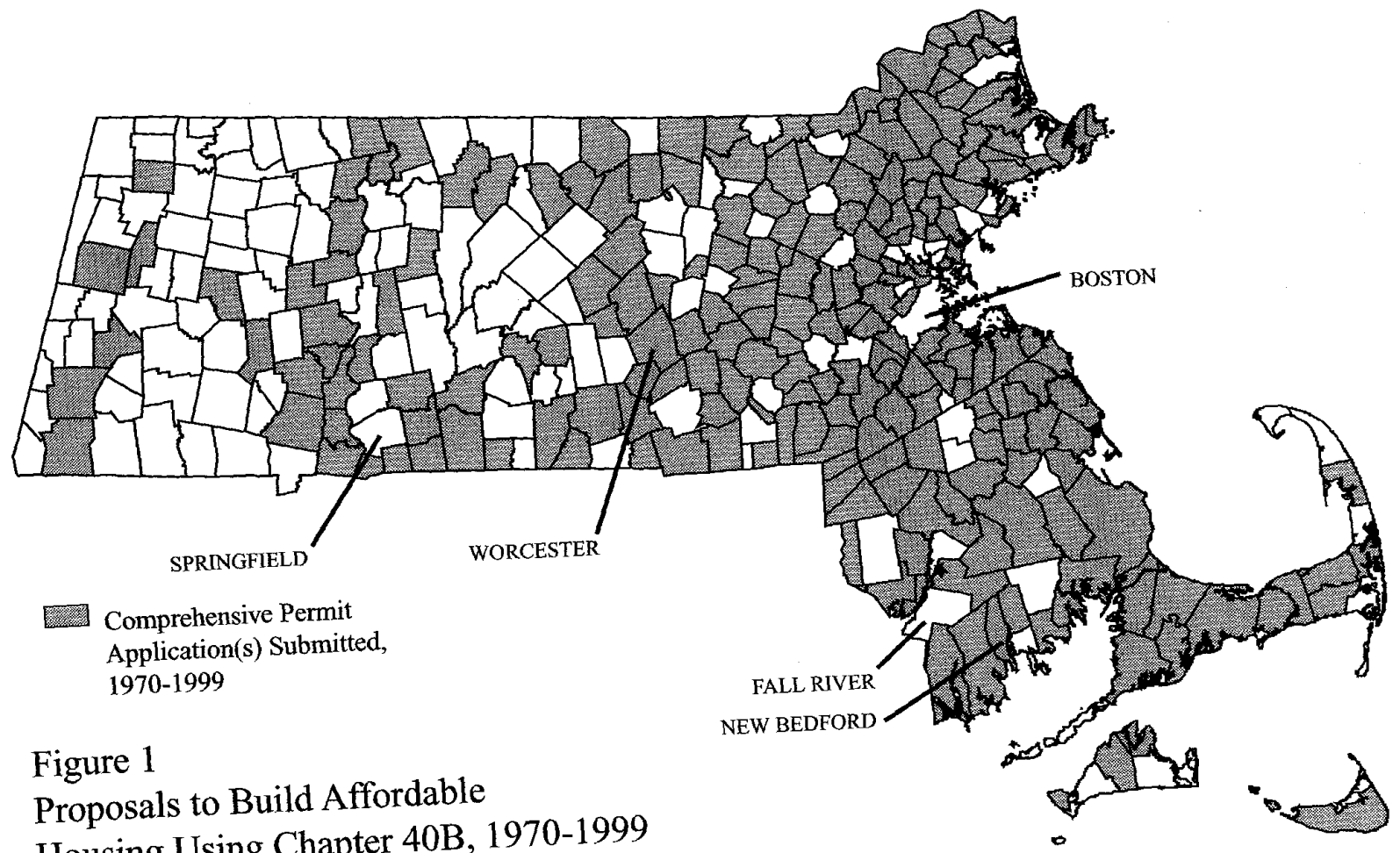


Figure 1  
Proposals to Build Affordable  
Housing Using Chapter 40B, 1970-1999

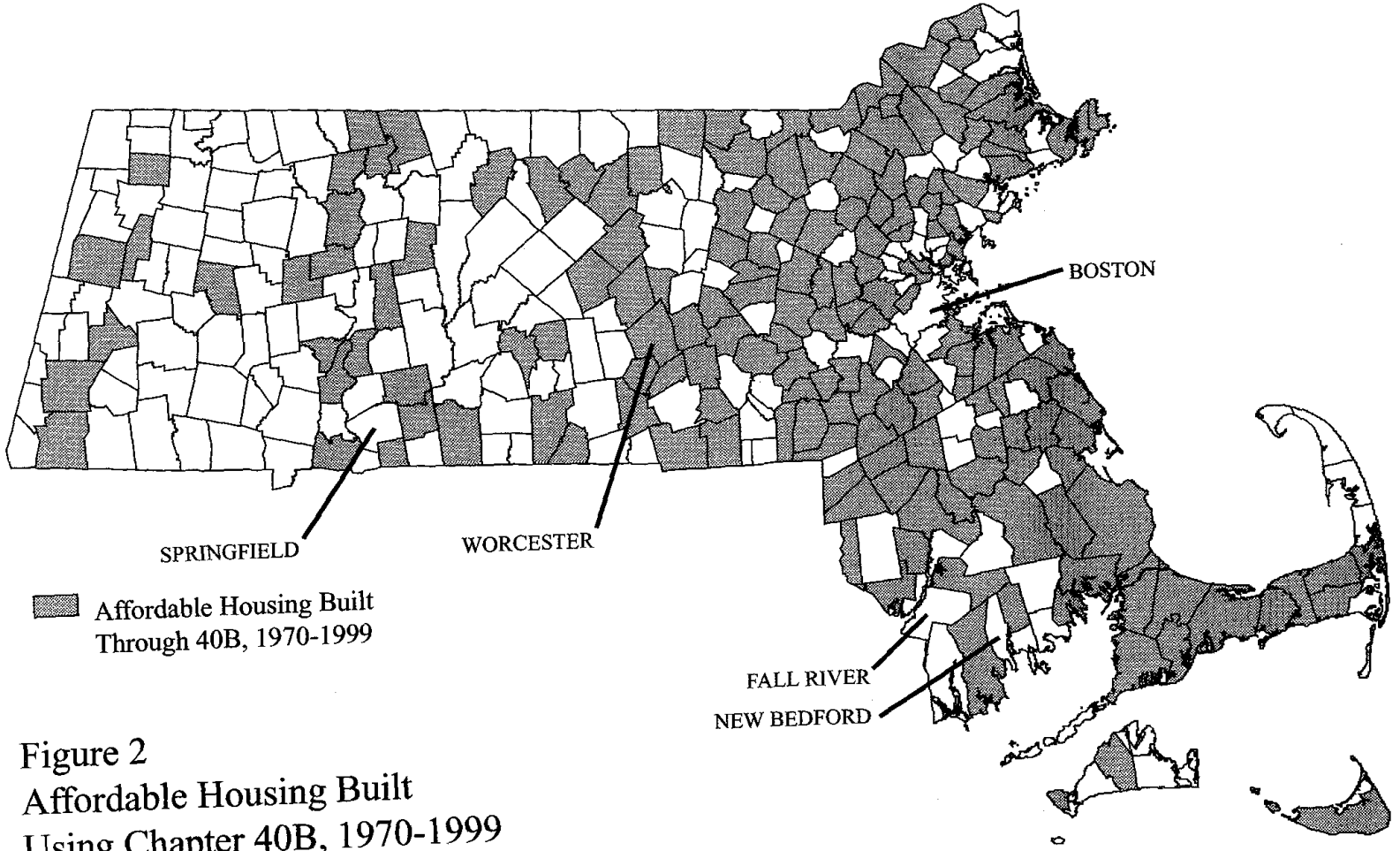


Figure 2  
Affordable Housing Built  
Using Chapter 40B, 1970-1999

Figure 3  
Type of Developer Applying for Comprehensive Permits, 1970-1999

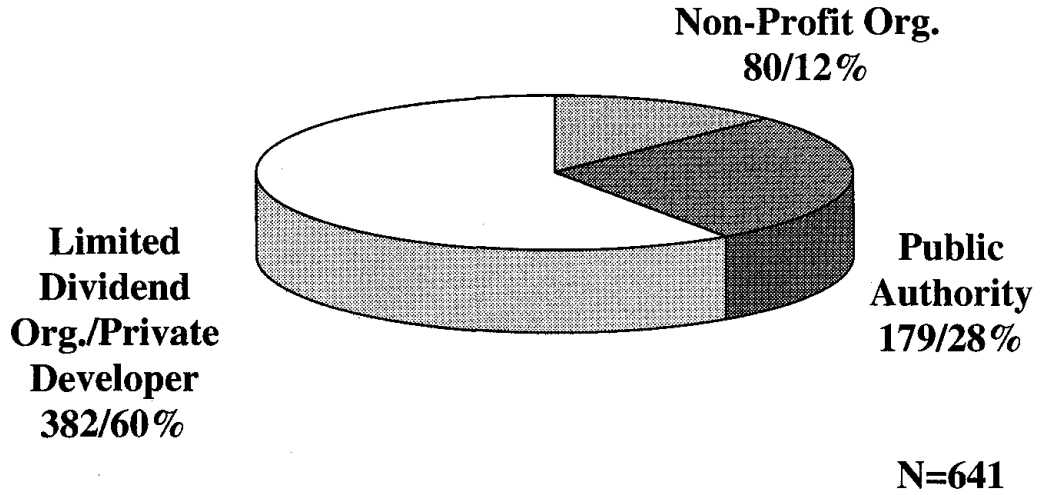


Figure 4  
Type of Housing Proposed Using the CP Process, 1970-1999

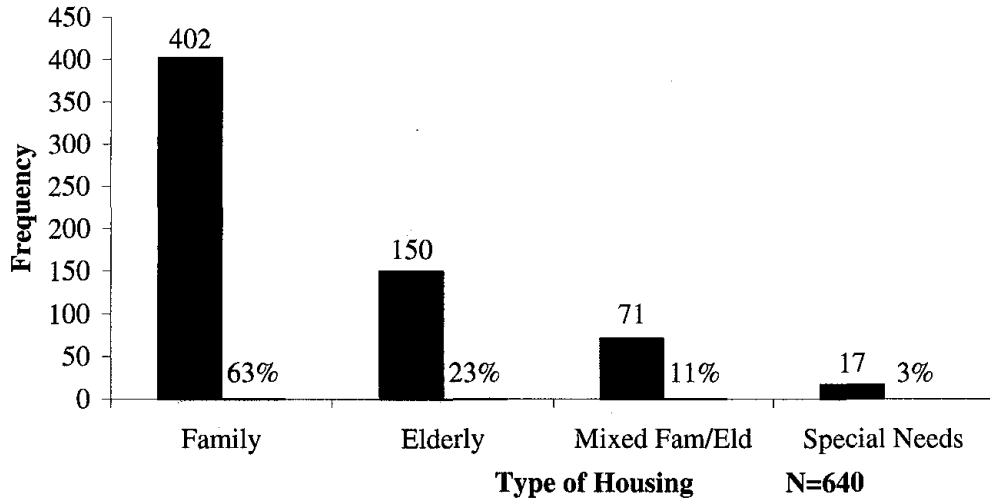


Figure 5  
Disposition of Comprehensive Permit Applications by  
Zoning Boards of Appeals, 1970-1999

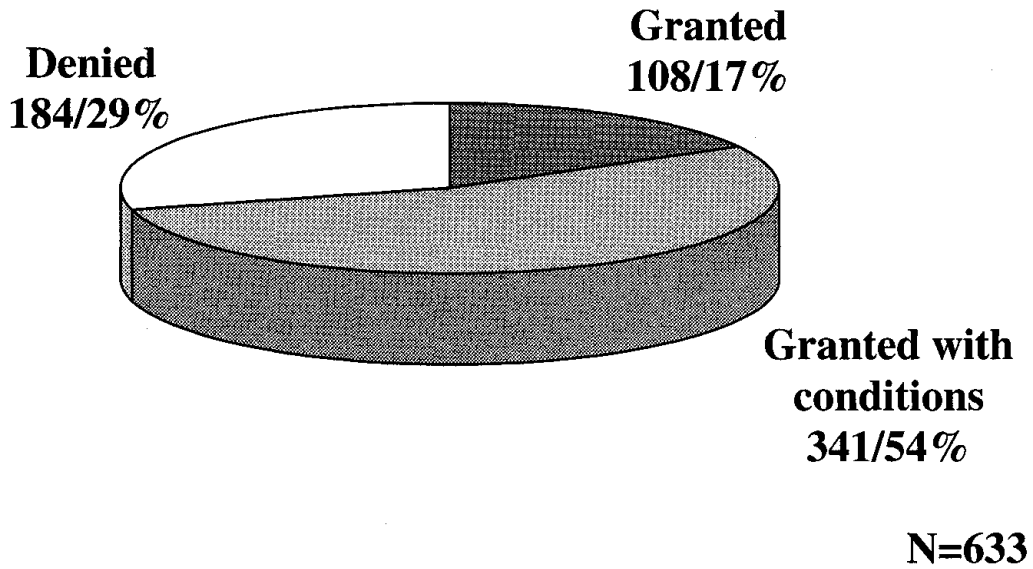
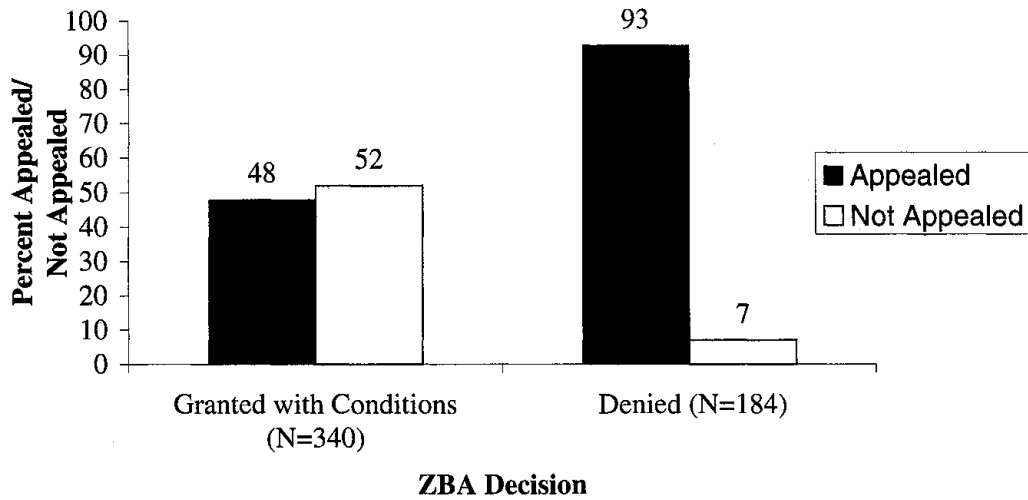
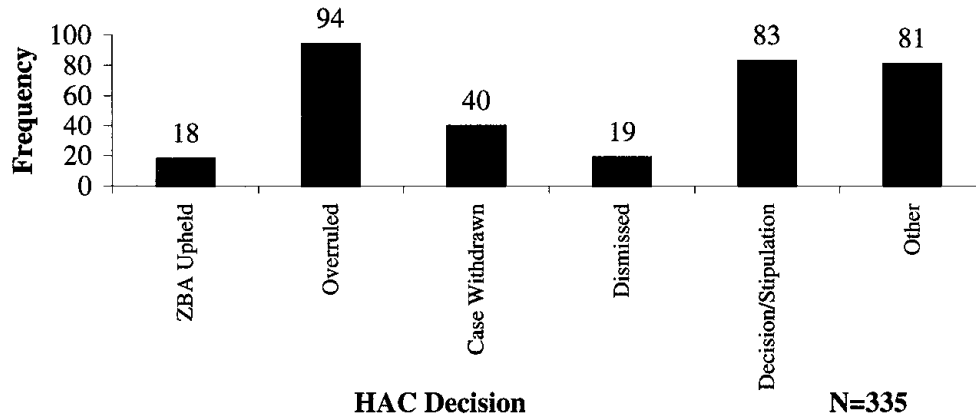


Figure 6  
ZBA Decisions Appealed/Not Appealed to the Housing  
Appeals Committee When CP Granted with  
Conditions or Denied

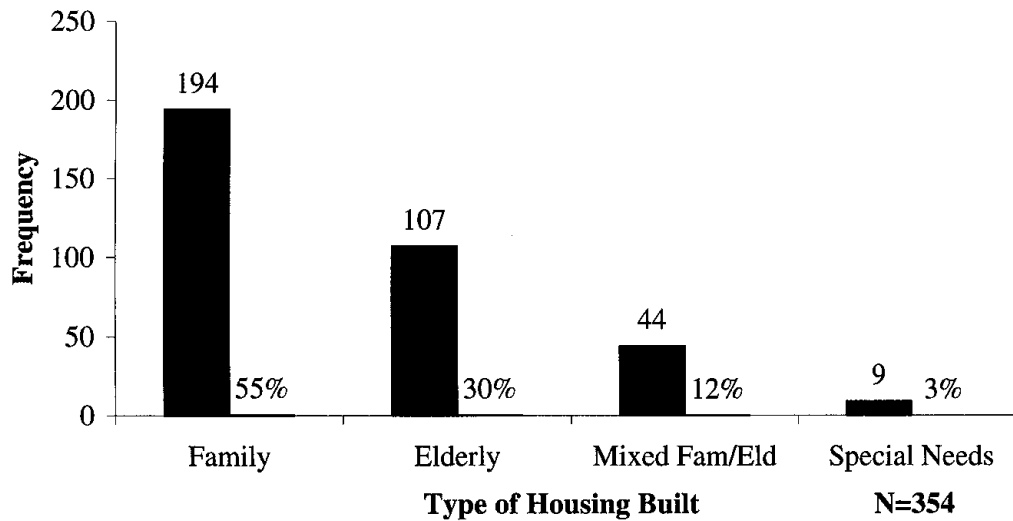


**Figure 7**  
Disposition by Housing Appeals Committee of  
Appealed ZBA Decisions, 1970-1999



Source: Housing Appeals Committee  
Records

**Figure 8**  
Type of Housing Project Built Using the CP Process,  
1970-1999



**TABLE 1**  
**ZBA DISPOSITION OF CP APPLICATIONS IN FOUR**  
**TIME PERIODS**

ZBA Decision	Time Period				Total
	1970-79	1980-84	1985-89	1990-99	
Denied	43%	35%	27%	20%	29%
Granted with conditions	39%	51%	62%	53%	54%
Granted	19%	14%	11%	27%	17%
N =	122	73	263	175	633

**TABLE 2**  
**HOUSING APPEALS COMMITTEE DISPOSITION OF CASES**  
**IN FOUR TIME PERIODS**

HAC Appeal Decision	Time Period				Total
	1970-79	1980-84	1985-89	1990-99	
ZBA Upheld	6%	9%	2%	13%	5%
ZBA Overruled	45%	24%	23%	25%	28%
Case Withdrawn	12%	2%	15%	11%	12%
Dismissed	4%	0%	7%	9%	6%
Decision/Stipulation	13%	24%	25%	38%	25%
Other	20%	40%	28%	5%	24%
N =	69	45	165	56	335

Note: Not all columns sum to 100% because of rounding.

**TABLE 3**  
**TYPE OF CHAPTER 40B HOUSING PROPOSED IN FOUR**  
**TIME PERIODS**

Type of Housing Proposed	Time Period				Total
	1970-79	1980-84	1985-89	1990-99	
Family	41%	22%	75%	76%	63%
Elderly	45%	49%	12%	14%	23%
Mixed Family/Elderly	14%	29%	10%	4%	11%
Special Needs	0%	0%	3%	6%	3%
N =	126	72	266	176	640

**TABLE 4**  
**TYPE OF CHAPTER 40B HOUSING PROJECTS BUILT IN**  
**FOUR TIME PERIODS**

Type of Housing Built	Time Period				Total
	1970-79	1980-84	1985-89	1990-99	
Family	29%	21%	65%	74%	55%
Elderly	56%	56%	17%	19%	30%
Mixed Family/Elderly	15%	23%	15%	2%	12%
Special Needs	0%	0%	4%	4%	3%
N =	66	48	142	98	354

Note: Not all columns sum to 100% because of rounding.

**TABLE 5**  
**SIZE OF CHAPTER 40B HOUSING PROJECTS PROPOSED**  
**IN FOUR TIME PERIODS**

Number of Units	Time Period				Total
	1970-79	1980-84	1985-89	1990-99	
1-24	8%	12%	32%	51%	31%
25-49	6%	29%	21%	25%	20%
50-99	33%	32%	21%	19%	24%
100-199	35%	22%	17%	5%	18%
200 or more	18%	5%	9%	0%	8%
N =	126	73	267	187	653

Note: Not all columns sum to 100% because of rounding.

**TABLE 6**  
**SIZE OF CHAPTER 40B HOUSING PROJECTS BUILT IN**  
**FOUR TIME PERIODS**

Number of Units	Time Period				Total
	1970-79	1980-84	1985-89	1990-99	
1-24	9%	16%	43%	57%	37%
25-49	8%	28%	23%	19%	20%
50-99	38%	34%	22%	19%	26%
100-199	38%	20%	8%	3%	14%
200 or more	8%	2%	6%	1%	4%
N =	66	50	143	103	362

Note: Not all columns sum to 100% because of rounding.

APPENDIX A  
CITIES AND TOWNS IN THE DATABASE

Abington	Dartmouth	Hopkinton	Northampton	Stoneham
Acton	Dedham	Hubbardston*	Northborough	Stoughton
Acushnet	Deerfield	Hudson	Northbridge	Stow
Adams	Dennis	Hull*	Northfield	Sturbridge
Agawam	Dighton	Huntington	Norton	Sudbury
Amesbury	Douglas	Ipswich	Norwell	Sutton*
Amherst	Dover*	Kingston	Norwood	Swampscott
Andover	Dracut	Lakeville	Oak Bluffs	Swansea
Arlington*	Duxbury	Lawrence	Orange	Taunton
Ashburnham	Dudley*	Lee	Orleans	Templeton
Ashland	Dunstable*	Leicester*	Oxford	Tewksbury
Athol	East Bridgewater	Leverett*	Palmer	Tisbury
Attleboro	East Longmeadow	Lincoln*	Paxton	Tolland*
Auburn	Eastham*	Lexington	Peabody	Topsfield
Ashfield*	Easthampton	Littleton	Pelham*	Townsend
Ayer*	Easton	Longmeadow	Pembroke	Truro*
Barnstable	Egremont*	Ludlow	Pepperell	Tyngsboro
Barre*	Essex*	Lunenburg	Peru*	Upton
Bedford	Everett*	Lynnfield	Petersham*	Uxbridge
Bellingham	Fall River*	Malden*	Pittsfield	Wakefield
Belmont	Falmouth	Manchester	Plainfield*	Wales
Berkley*	Fitchburg	Mansfield	Plainville	Walpole
Berlin*	Florida*	Marblehead	Plymouth	Waltham
Bernardston	Foxboro	Marion	Plympton*	Ware*
Beverly	Framingham	Marlborough	Princeton	Wareham
Billerica	Franklin	Marshfield	Quincy	Warren*
Blackstone	Gardner	Mashpee	Randolph	Watertown
Bolton	Gay Head	Mattapoisett	Raynham	Wayland
Bourne	Georgetown	Maynard	Reading	Webster
Boxborough*	Gill	Medfield	Rehoboth*	Wellesley
Boxford	Groveland	Medway	Revere	Wellfleet
Braintree	Gloucester	Melrose	Rochester*	Wenham
Brewster	Grafton	Merrimac	Rockland	West Boylston
Brookfield*	Great Barrington	Methuen	Rockport	West Bridgewater*
Bridgewater	Greenfield	Middleborough	Rowe*	West Brookfield
Brookline	Groton	Middlefield*	Rowley	West Newbury
Buckland*	Goshen*	Middleton	Russell*	West Springfield
Burlington	Granville*	Millbury	Rutland	West Stockbridge*
Cambridge	Halifax	Millis	Salisbury	West Tisbury
Canton	Hamilton	Milford*	Sandisfield*	Westborough
Carlisle*	Hampden	Milton	Sandwich	Westfield
Carver	Hancock*	Monson	Saugus	Westford
Charlton	Hanover	Monterey*	Scituate	Westminster
Chatham*	Hanson	Nahant*	Seekonk	Weston
Chelmsford	Hardwick*	Nantucket	Sharon	Westport
Chelsea	Harvard	Natick	Sheffield	Westwood
Cheshire*	Hatfield*	Needham	Shelburne*	Weymouth
Chester*	Harwich	Newbury*	Sherborn*	Whately
Chesterfield*	Haverhill	New Bedford	Shrewsbury	Whitman
Chicopee*	Hawley*	New	Shutesbury	Wilbraham
Chilmark*	Heath*	Marlborough*	Somerset	Williamsburg
Clarksburg*	Hingham	Newburyport	Somerville	Wilmington
Clinton	Hinsdale*	Newton	South Hadley	Winchester
Cohasset	Holbrook	Norfolk	Southampton	Woburn
Colrain*	Holden	North Andover	Southborough	Worcester
Concord	Holliston	North Attleboro	Southbridge	Worthington
Cummington*	Holyoke	North Brookfield	Springfield*	Wrentham
Dalton	Hopedale	North Reading	Stockbridge*	Yarmouth

\*Cities and towns whose ZBA replied to the 1997 Krefetz Survey and reported having received no CP applications



## APPENDIX B

## LIST OF PAST AND PRESENT MASSACHUSETTS STATE AND LOCAL OFFICIALS INTERVIEWED

- Kristina Allen, Member, Westborough Board of Selectmen, Westborough, Mass. (Nov. 8, 1999).
- Amy S. Anthony, Secretary (1983-90), Executive Office of Communities and Development ("EOCD"), Boston, Mass. (Mar. 13, 1997).
- Robert Barrell, Executive Director, Hudson Housing Authority (May 23, 1997) (Telephone Interview).
- Steve Colyer, Town Planner, Andover, Mass. (Apr. 9, 1997) (Telephone Interview).
- Joseph Flatley, President and CEO, Massachusetts Housing Investment Corporation, and former staff member, Department of Community Affairs & EOCD, Boston, Mass. (Mar. 27, 1997).
- Augusto F. Grace, Co-chair of Special Commission Relative to the Implementation of Low and Moderate Housing Provisions (1988-89); former member, Massachusetts House of Representatives, Fitchburg, Mass. (Feb. 28, 1997).
- Aaron Gornstein, Executive Director, Citizens Housing and Planning Association, (July 30, 1997) (Telephone Interview).
- Steve Karlin, Town Planner, Ashland, Mass. (July 2, 1997) (Telephone Interview).
- Werner Lohe, Chair, Housing Appeals Committee (1993-present), HAC Counsel (1990-93) Boston, Mass. (Jan. 29, 1997).
- Gary McCarthy, Town Clerk & Assistant Town Manager, Dracut, Mass. (May 28, 1997) (Telephone Interview).
- Kevin O'Connor, Chair, Tyngsboro ZBA (July 10, 1997) (Telephone Interview).
- David Palmer, Principal Planner, Barnstable, Mass. (July 7, 1997) (Telephone Interview).
- Mary Padula, former Secretary, EOCD; Director, Department of Housing and Community Development ("DHCD") (1991-96), Lunenburg, Mass. (Feb. 13, 1997).
- Ruthann Peterson, Secretary, Westwood ZBA (May 23, 1997) (Telephone Interview).
- Katherine Racer, Director, Private Housing Division, DHCD; EOCD staff member (1983-present) (Mar. 25, 1997) (Telephone Interview).
- Marlene Richardson, Boston Fair Housing Clearinghouse/Metrolist (July 30, 1997) (Telephone Interview).
- Jim Robbins, Town Planner, Westborough, Mass. (Nov. 8, 1999).
- Bert Rodiger, former Assistant Director, Private Housing Division; Overseer, Local Initiative Program, DHCD, Boston, Mass. (Feb. 7, 1997).
- Mark Siegenthaler, Member of the Housing Appeals Committee; Member of the Bedford Board of Selectmen; former Director of Municipal Development Programs (1987-99), EOCD & DHCD (Feb. 21, 1997).
- Jane Wells, Deputy Director, Massachusetts State Mediation Service, Boston, Mass. (Feb. 7, 1997).
- Jay Woodward, Director of Planning, Brookline, Mass. (July 2, 1997) (Telephone Interview).
- Clark Ziegler, Director, Massachusetts Housing Partnership, former Deputy Director (1985-1990), EOCD Boston, Mass. (Mar. 4, 1997).

APPENDIX C  
CITIES AND TOWNS WITH COMPREHENSIVE PERMIT APPLICATIONS 1970-1999

Abington	Douglas	Littleton	Orleans	Tisbury
Acton	Dracut	Longmeadow	Oxford	Topsfield
Acushnet	Duxbury	Ludlow	Palmer	Townsend
Adams	East Bridgewater	Lunenburg	Paxton	Tyngsboro
Agawam	East Longmeadow	Lynnfield	Peabody	Upton
Amesbury	Easthampton	Manchester	Pembroke	Uxbridge
Amherst	Easton	Mansfield	Pepperell	Wakefield
Andover	Falmouth	Marblehead	Pittsfield	Wales
Ashburnham	Fitchburg	Marion	Plainville	Walpole
Ashland	Foxboro	Marlborough	Plymouth	Waltham
Athol	Framingham	Marshfield	Princeton	Wareham
Attleboro	Franklin	Mashpee	Quincy	Watertown
Auburn	Gardner	Mattapoissett	Randolph	Wayland
Barnstable	Gay Head	Maynard	Raynham	Webster
Bedford	Georgetown	Medfield	Reading	Wellesley
Bellingham	Gill	Medway	Revere	Wellfleet
Belmont	Gloucester	Melrose	Rockland	Wenham
Bernardston	Grafton	Merrimac	Rockport	West Boylston
Beverly	Great Barrington	Methuen	Rowley	West Brookfield
Billerica	Greenfield	Middleborough	Rutland	West Newbury
Blackstone	Groton	Middleton	Salisbury	West Springfield
Bolton	Groveland	Millbury	Sandwich	West Tisbury
Bourne	Halifax	Millis	Saugus	Westborough
Boxford	Hamilton	Milton	Scituate	Westfield
Braintree	Hampden	Monson	Seekonk	Westford
Brewster	Hanover	Nantucket	Sharon	Westminster
Bridgewater	Hanson	Natick	Sheffield	Weston
Brookline	Harvard	Needham	Shrewsbury	Westport
Burlington	Harwich	New Bedford	Shutesbury	Westwood
Cambridge	Haverhill	Newburyport	Somerset	Weymouth
Canton	Hingham	Newton	Somerville	Whately
Carver	Holbrook	Norfolk	South Hadley	Whitman
Charlton	Holden	North Andover	Southampton	Wilbraham
Chelmsford	Holliston	North Attleboro	Southborough	Williamsburg
Chelsea	Holyoke	North Brookfield	Southbridge	Wilmington
Clinton	Hopedale	North Reading	Stoneham	Winchester
Cohasset	Hopkinton	Northampton	Stoughton	Woburn
Concord	Hudson	Northborough	Stow	Worcester
Dalton	Huntington	Northbridge	Sturbridge	Worthington
Danvers	Ipswich	Middlefield	Sudbury	Wrentham
Dartmouth	Kingston	Norton	Swampscott	Yarmouth
Dedham	Lakeville	Norwell	Swansea	
Deerfield	Lawrence	Norwood	Taunton	
Dennis	Lee	Oak Bluffs	Templeton	
Dighton	Lexington	Orange	Tewksbury	

APPENDIX D  
CITIES AND TOWNS WITH AFFORDABLE HOUSING BUILT USING 40B

Abington	Dennis	Hudson	Norwell	Swampscott
Acton	Dighton	Ipswich	Orleans	Tewksbury
Acushnet	Douglas	Kingston	Oxford	Topsfield
Adams	Dracut	Lawrence	Peabody	Townsend
Agawam	Duxbury	Lee	Pembroke	Tyngsborough
Amesbury	East Bridgewater	Lexington	Pepperell	Uxbridge
Amherst	East Longmeadow	Littleton	Pittsfield	Wakefield
Andover	Easthampton	Ludlow	Plymouth	Walpole
Ashland	Easton	Lynnfield	Princeton	Waltham
Athol	Falmouth	Mansfield	Randolph	Wareham
Attleboro	Fitchburg	Marion	Raynham	Wayland
Auburn	Foxboro	Marlborough	Reading	Wellesley
Barnstable	Framingham	Marshfield	Revere	Wenham
Bedford	Franklin	Mashpee	Rockland	West Boylston
Bellingham	Gardner	Medfield	Rockport	West Brookfield
Bernardston	Gay Head	Medway	Rowley	West Newbury
Beverly	Georgetown	Melrose	Rutland	West Tisbury
Billerica	Gill	Merrimac	Sandwich	Westborough
Bolton	Gloucester	Methuen	Saugus	Westford
Bourne	Grafton	Middleborough	Scituate	Westminster
Boxford	Great Barrington	Millbury	Seekonk	Weston
Braintree	Greenfield	Millis	Sharon	Westwood
Brewster	Groton	Monson	Sheffield	Weymouth
Bridgewater	Halifax	Nantucket	Shrewsbury	Whately
Brookline	Hamilton	Natick	Shutesbury	Wilbraham
Burlington	Hanson	Needham	Somerset	Williamsburg
Cambridge	Harvard	Newton	Somerville	Wilmington
Canton	Harwich	Norfolk	South Hadley	Winchester
Carver	Haverhill	North Andover	Southbridge	Woburn
Chelmsford	Hingham	North Attleboro	Stoughton	Worcester
Chelsea	Holbrook	North Brookfield	Stow	Worthington
Concord	Holden	Northborough	Sturbridge	Wrentham
Dalton	Holliston	Northbridge	Sudbury	Yarmouth
Dartmouth	Holyoke	Northfield	Swansea	
Deerfield	Hopkinton	Norton	Templeton	